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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1952

No. 201

FRED SLENKER and ELIZABETH SLENKER,
Petitioners,

vs.

GRAND LODGE OF THE STATE OF ILLINOIS OF THE INDEPENDENT ORDER OF ODD FELLOWS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

HUGH M. MATCHETT,
DAVID F. MATCHETT, JR.
WALTER F. DODD,
HUBERT L. WILL,
Chicago, Ill.

Dated: Chicago, Ill., July 14, 1952.

BARNARD & MILLER, 33 S. Market St., Chicago 6. FRanklin 2-0562

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vs.

GRAND LODGE OF THE STATE OF ILLINOIS OF THE INDEPENDENT ORDER OF ODD FELLOWS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Your petitioners, Fred Slenker and Elizabeth Slenker, respectfully pray for a writ of certiorari herein to review a final order (Rec. 83) of the Supreme Court of Illinois, being the highest court of said State, by which order said court denied two motions (Rec. 39, 81) to vacate an order (Rec. 38) dismissing a writ of error (Rec. 1) sued out in said court to review a decision (Rec. 6) of the Appellate Court of Illinois, Second District, on federal and

state constitutional grounds (Rec. 300), by which decision the said Appellate Court affirmed a judgment of the Circuit Court of Henry County, Illinois (Rec. 25), after trial by jury (Rec. 7), notwithstanding verdicts in favor of petitioners (Rec. 7), that petitioners' complaint be dismissed at their costs (Rec. 7); and to review said order of dismissal (Rec. 38).

The action in the trial court was one for damages for personal injuries sustained by petitioners in a collision between their automobile and a car driven by an agent of the respondent while engaged in carrying on the business of the corporation and while acting within the scope of his employment as a proximate result of his negligence (Rec. 7, 8). The cause of action accrued in Henry County, Illinois. The trial court entered judgment for the defendant notwithstanding verdicts totalling Twenty-four Thousand Dollars ($24,000.00) in favor of petitioners on the ground the defendant was a charitable corporation. Petitioners appealed to the Illinois Appellate Court, Second District, which affirmed the judgment on the ground the defendant corporation was a charitable corporation whose assets were all held in trust for the purposes of the Independent Order of Odd Fellows and these assets had to be protected (Rec. 74).

Petitioners after first exhausting all possibility of obtaining further review by appeal within the State judicial system (Rec. 25, 27), sued out a writ of error (Rec. 1) in the Supreme Court of Illinois to review the decision of the Appellate Court on state and federal constitutional grounds (Rec. 300), i.e., that the State of Illinois in enforcing any immunity to judgment deprives an injured person of his fundamental right to personal security and property without due process of law and denies to him the equal protection of the law, contending that the constitutional questions had arisen for the first time in the

Appellate Court upon the rendition of the decision and the extinction of any possibility of further review by appeal without fault on the part of either of the petitioners (Rec. 302). The Supreme Court of Illinois on motion of respondent (Rec. 28) dismissed the writ of error without opinion (Rec. 38) and subsequently denied two motions of petitioners to set aside the order of dismissal (Rec. 39, 81). Petitioners seek further review by this court on certiorari to reverse not only the order refusing to set aside the order of dismissal but the order of dismissal as well (Rec. 83, 38).

OPINIONS BELOW.

The Supreme Court of Illinois dismissed the writ of error without opinion. The opinion of the Appellate Court of Illinois, Second District, is reported as *Slenker* v. *Gordon,* 344 Ill. App. 1. It is printed in the record commencing at page 6.

JURISDICTION.

Procedural Aspects

The Supreme Court of Illinois dismissed the writ of error on January 16, 1952 (Rec. 38). This was a void order because it was entered in violation of the rules of court. (See discussion below at page 4). The term of court expired on January 28, 1952 (Rec. 38). Prior to June 21, 1933, the order of dismissal, had it been a valid order, would have become a conclusive adjudication upon the expiration of the term. (*Barnard* v. *Michael,* 392 Ill. 130.) It now could only become a conclusive adjudication upon the expiration of thirty days from the date of its rendition, i.e., February 15, 1952 (Sec. 82, Ch. 77, Ill. Rev. Stat. 1951). On February 1, 1952 petitioners filed a motion and

supplemental motion to set aside and vacate the order of dismissal (Rec. 39). Prior to June 21, 1933, the order of dismissal, had it been a valid order, could have been modified, set aside or vacated prior to the expiration of the term of court at which it was rendered (*Corwin* v. *Rheims,* 390 Ill. 205; *Department of Public Works & Buildings* v. *Legg,* 374 Ill. 306) or in pursuance of a motion made at that term (*Corwin* v. *Rheims,* 390 Ill. 205; *Hosking* v. *Southern Pacific Co.,* 243 Ill. 320; *Lenhart* v. *Miller,* 375 Ill. 346). It therefore could now be modified, set aside or vacated in pursuance of a motion made within thirty days from the date of its rendition (Sec. 83, Ch. 77, Ill. Rev. Stat. 1951). Prior to June 21, 1933, the order of dismissal, if void, could have been modified, set aside or vacated after the expiration of the term at which it was rendered at any time. (*Ward* v. *Sampson,* 395 Ill. 353; *Barnard* v. *Michael,* 392 Ill. 130.) It therefore could now be modified, set aside or vacated after the expiration of the term at which it was rendered at any time (Sec. 84, Ch. 77, Ill. Rev. Stat. 1951). These were denied on March 11, 1952 (Rec. 83). This is the final order for purposes of determining when the time for filing a Petition For Writ of Certiorari starts to run. *Market Street R. Co.* v. *Railroad Commission of California,* 324 U.S. 548, 552; *Gypsy Oil Co.* v. *Escoe,* 275 U.S. 498, 499. Time for filing a petition for writ of certiorari, which would otherwise have expired June 9, 1952, was extended to and including June 23, 1952, by order of Mr. Justice Minton dated June 6, 1952 (Rec. 312). Further extension was granted to and including July 16, 1952, by order of Mr. Justice Jackson dated June 17, 1952.

The jurisdiction of this court is invoked under 28 U.S.C. 1257(3).

The Order Dismissing the Writ of Error was Void.

In Illinois the Supreme Court of the State "has not only

the inherent power to prescribe rules of practice and procedure, but the power is expressly conferred by the statute. Ill. Rev. Stat. 1951, c. 110, § 126. [Art. 1, Sec. 2(1) Civil Practice Act 1951: 'The Supreme Court of this State shall have power to make rules of pleading, practice and procedure for the * * * Supreme Courts supplementary to but not inconsistent with the provisions of this Act, and to amend the same * * *.'] *Such rules, when established, have the force of law. People* v. *Callopy*, 358 Ill. 11; *Lancaster* v. *Waukegan & Southwestern Railway Co.*, 132 Ill. 492." (Italics ours.) *Gyure* v. *Sloan Valve Co.*, 367 Ill. 489; *People* v. *Craig*, 404 Ill. 505. Such rules "*are binding on this and other courts the same as on litigants.*" *Swain* v. *Hoberg*, 380 Ill. 442. "*A mandatory rule which limits the power of the Court as well as the parties must be complied with, and acts not complying therewith are void.*" (Italics ours.) Sec. 176, Courts, 21 C.J.S. p. 279, n. 63.

In the present case the Supreme Court of Illinois violated its own rules in three important respects in entering its order dismissing the writ of error. It thus denied petitioners due process of law and denied to them the equal protection of the laws of the State of Illinois in violation of the 14th Amendment. Its order was therefore void and of no effect.

First: The Supreme Court of Illinois violated its own rules in entertaining the motion to dismiss the writ of error at the time the motion was presented for consideration. Rule 28 (Sec. 259.28, Ch. 110, Ill. Rev. Stat. 1951) provides that: "the rules of this court referring to appellant and appellee shall, to the extent applicable, include plaintiff in error and defendant in error in criminal cases, and in civil cases where writ of error is preserved as a method of review." Rule 41 (Sec. 259.41, Ch. 110, Ill. Rev. Stat. 1951) provides: "The abstract and the brief of the appellant in

the Supreme Court * * * must be filed in the Clerk's office on or before 20 days before the first day of the term at which the cause will stand for hearing, *unless the time for filing the same is extended.*" (Italics ours.) The appellee under the rule has 20 days from the date he is served with a copy of the appellant's brief in which to file his brief. Rule 41 is applicable to writs of error since there is no special statute regulating the filing of briefs in support of or answer to a writ of error. Rule 42 (Sec. 259.42, Ch. 110, Ill. Rev. Stat. 1951) provides that *all cases* other than criminal are to be placed on the docket and called for hearing in the order in which the records have been filed with the Clerk. Rule 43 (Sec. 259.43, Ch. 110, Ill. Rev. Stat. 1951) with certain exceptions not here relevant provides: "Where, by reason of an extension of time for filing briefs, the brief of the appellee is not due and is not filed at the time the cause is called for hearing the cause *will be continued.*" (Italics ours.) In this case petitioners as plaintiffs in error had filed their record in the office of the Clerk of the Supreme Court of Illinois more than 20 days before the commencement of the January Term 1952 which began on the second Monday of January (Sec. 6, Ch. 37, Ill. Rev. Stat. 1951) and the *scire facias* had been served before that date. On December 21, 1951, Mr. Justice Daily of the Supreme Court of Illinois entered an order extending the time for plaintiffs in error to file abstracts and briefs to February 13, 1952 (Rec. 44, 85). Manifestly the briefs of appellees would not be filed until after February 13, 1952, which was after the January Term, 1952, and the cause automatically under the rules was continued from the January Term 1952, to which it had originally been docketed, to the March Term 1952. Notwithstanding this automatic continuance under its own rules, the Supreme Court of Illinois proceeded to entertain a motion to dismiss the writ of error at the January Term 1952 and to grant the

motion to dismiss at that term (Rec. 28, 38). Under its own rules it had no right or power to do so.

Second: The Supreme Court of Illinois violated its own rules in granting the motion to dismiss the writ of error on January 16, 1952 (Rec. 38) the third day of the January Term 1952. Rule 70 (Sec. 259.70, Ch. 110, Ill. Rev. Stat. 1951) provides in part: "In all cases in the reviewing court where the defendant in error or appellee desires to file a motion in the nature of a plea, he shall file his motion in the office of the clerk not later than the first day of the term to which the cause is docketed, and the plaintiff in error or appellant or any co-parties who do not join in the motion shall file their suggestions, if any, in opposition to the motion on or before the fifth day of the term or within such further extended time as the court may grant upon application made within such five days." The January Term of the Supreme Court of Illinois began on January 14, 1952 (Sec. 6, Ch. 37, Ill. Rev. Stat. 1951). The motion of defendants in error to dismiss the writ of error was filed on that date. It asked dismissal of the writ of error on the grounds it was not filed within 40 days after the judgment of the Appellate Court became final, i.e., a plea of limitations (Rec. 28). If correct, this ground would bar the prosecution of the writ of error. Prior to the adoption of Sec. 86½ of the Civil Practice Act (Sec. 210a, Ch. 110, Ill. Rev. Stat. 1951) this defense would have to be raised by plea. *Kerner* v. *Thompson*, 365 Ill. 149; *Peterson* v. *Manhattan Life Ins. Co.*, 244 Ill. 329, 334. That Act provides it shall now be raised by motion in lieu of a plea. Petitioners were therefore entitled to five days in which to respond to this motion. The Supreme Court of Illinois, in violation of its own rules, decided the motion on January 16 before the period of five days expired, depriving petitioners of their opportunity to answer the motion. In *Oxman* v. *Baker County*, 115 Ore. 436, 448, the court had

before it a case involving a judgment entered in violation of a rule of court that was mandatory. A judgment had been entered in the trial court on November 1, 1924. On December 27, 1924, the trial court entered an *ex parte* order without notice to plaintiffs directing an entry of judgment identical with that of November 1, 1924 but allowing defendant until March, 1925, in which to prepare and submit a bill of exceptions. A rule of the trial court provided that a bill of exceptions *must* be entered within 30 days after judgment. The Supreme Court of Oregon held the rule binding upon the court, and held the order of December 27, 1941, was a nullity stating: "Where a court has established rules for its government and that of suitors, there exists no discretion in the court to dispense at pleasure with their rules, or to innovate an established practice." See also Sec. 176, Courts, 21 C.J.S., p. 279, n. 63. That decision is good law and is applicable here. It follows the order of dismissal in the instant case was a void order.

Third: The Supreme Court of Illinois violated its own rules in dismissing the writ of error on January 16, 1952, because Rule 63 (Sec. 259.63, Ch. 110, Ill. Rev. Stat. 1951) provides that a defendant in error shall not be at liberty to enter his appearance *and compel the plaintiff in error to proceed with the cause* unless the defendant in error shall have given the plaintiff in error 20 days' notice before the term of his intention to enter his appearance *and have the cause proceed to a hearing* and no 20-day notice of such intention was given in this cause. (Italics ours.) It follows that said order dismissing the writ of error is void.

Substantive Aspects

In *Stembridge* v. *State of Georgia*, 72 S. Ct. 834, 837-8, this court said:

> "Where the highest court of the state delivers no opinion and it appears that the judgment *might* have

> rested upon a non-federal ground, this court will not take jurisdiction to review the judgment. * * * We are without jurisdiction when the existence of an adequate state ground is debatable."

As stated above the Supreme Court of Illinois in dismissing the writ of error rendered no opinion. But it is affirmatively demonstrated by the record that no *adequate* non-Federal ground could have been the basis for the action of the Supreme Court of Illinois in dismissing the writ of error and that it simply decided the Federal constitutional questions presented adversely to petitioners' contentions.

The possible grounds on which the court might have relied in dismissing the writ of error are stated in respondents' motion to dismiss the writ of error (Rec. 28). Paragraph 1 of that motion does not state any valid ground on which the Supreme Court of Illinois could have relied in view of its decision in *Altschuler* v. *Altschuler*, 410 Ill. 169, at 173-4 (Rec. 70-71), that a common law writ of error to review a judgment of the Appellate Court where a constitutional question has been injected into the case by the judgment of the Appellate Court need not be sued out within the 90-day limitation period established by Section 76 of the Civil Practice Act. Sec. 200, Ch. 110 (Ill. Rev. Stat. 1951) which governs in the case of ordinary appeals. No provision has been made by the Illinois legislature for the mode of prosecuting writs of error from the Appellate Court to the Supreme Court of Illinois under such circumstances. *Altschuler* v. *Altschuler*, 410 Ill. 169, at 173-4 (Rec. 70-71), [redacted] In the absence of any legislative enactment establishing a limitation period the only period applicable is the common law period of twenty years. *Peterson* v. *Manhattan Life Ins. Co.*, 244 Ill. 329, 334. The other non-Federal grounds advanced by that motion (a) any constitutional question was waived

because no constitutional question was raised in the trial court; (b) any constitutional question was waived by taking the case to the Illinois Appellate Court, Second District, errors being assigned of which that court had jurisdiction, and (c) were not raised in the Petition For Leave To Appeal to the Supreme Court of Illinois, are so inseparably tied up with the determination of the Federal constitutional points raised by the writ of error and by this Petition that they cannot be considered as being adequate non-Federal grounds.

There is a presumption against waiver of fundamental constitutional rights (*Johnson* v. *Zerbst*, 304 U.S. 464). This court has, of course, the ultimate determination as to whether the federal right asserted may be so lost, and whether, under the particular circumstances, it has been (*Parker* v. *Illinois*, 333 U.S. 571). Where a state court finds as a fact that a federal right has been waived or lost by estoppel this court is not bound by that ruling, but will analyze the facts for itself and reach its own conclusions as to their effect (*Truax* v. *Corrigan*, 257 U.S. 312, 324-325; *Union Pacific R. Co.* v. *Public Service Commission of Missouri*, 248 U.S. 67, 69-70; *Ward* v. *Board of County Com'rs*, 253 U.S. 17, 22-23; *Davis* v. *O'Hara*, 266 U.S. 314). Nor can the doctrine of whole or partial immunity of private charitable corporations from tort liability justify the dismissal of the writ of error as a non-Federal ground because any such rule is itself under attack on federal constitutional grounds.

QUESTIONS PRESENTED.

1. Whether the State of Illinois through the action of the Illinois Appellate Court in affirming the judgment of the trial court notwithstanding a verdict ripe for judg-

ment under the ordinary rules of tort liability applicable to all other private persons, individual or corporate, in that jurisdiction, coupled with the extinction of any possibility of further review by appeal within the State judicial system without fault on the part of petitioners, deprived petitioners of their personal security and property without due process of law and denied to them the equal protection of its laws in violation of their federal rights under Section 1 of the 14th Amendment to the Constitution of the United States?

2. Whether the State of Illinois in developing the common law policy of the State may exempt a private charitable corporation from judgment on a verdict ripe for judgment under the ordinary rules of tort liability applicable to all other private persons, individual and corporate, in that jurisdiction, such immunity being unknown to the common law of England on March 24, 1606, the date on which the statutes of England ceased to be the common law in Illinois and May 6, 1776, the date the Colony of Virginia declared its independence from England and July 4, 1776, the date of the Declaration of Independence and being unknown to the common law in America on July 28, 1868, the date the 14th Amendment to the Constitution of the United States went into effect, without depriving the plaintiff of his personal security and property without due process of law and denying to him the equal protection of its laws in violation of his federal rights under Section 1 of the 14th Amendment to the Constitution of the United States? At least where the plaintiff is a stranger to the institution?

3. Whether the State of Illinois in developing the common law policy of the State may exempt a private charitable corporation not presently possessed of non-trust property at the time of trial from judgment on a verdict ripe

for judgment under the ordinary rules of tort liability applicable to all other private persons, individual and corporate, in that jurisdiction, including private charitable corporations presently possessed of insurance or other non-trust property at the time of trial, without depriving the plaintiff of his personal security and property without due process of law and denying to him the equal protection of its laws in violation of his federal rights under Section 1 of the 14th Amendment to the Constitution of the United States? And where the plaintiff is a stranger to the institution?

4. Whether the State of Illinois in developing the common law policy of the State may set up as a test of liability of a defendant to judgment in an action in tort possession by the defendant at the time of trial of non-trust property subject to being taken to satisfy the judgment—a factor alien to any question of fault, damage, or right of satisfaction—without depriving the person to whose detriment the test is applied of his personal security and property without due process of law and denying to him the equal protection of its laws in violation of his federal rights under Section 1 of the 14th Amendment to the Constitution of the United States?

5. Whether the constitutional questions presented arose for the first time in the Illinois Appellate Court, Second District, upon extinction of any possibility of further review by appeal within the State judicial system without fault on the part of the petitioners, or were present in the trial court; and, if they were present in the trial court, whether they were waived by petitioners by failure to assert them in the trial court or by appealing to the Illinois Appellate Court in the first instance rather than to the Supreme Court of Illinois; which involves a further determination—whether the State of Illinois provides any ade-

quate means by which the common law policy of the State may be challenged or tested by or subjected to or governed by the requirements of Section 1 of the 14th Amendment to the Constitution of the United States?

6. Whether the State of Illinois acting through its judicial department deprived petitioners of their personal security and property without due process of law and denied them the equal protection of its laws in violation of their federal rights under Section 1 of the 14th Amendment to the Constitution of the United States by the action of the Supreme Court of Illinois in (a) dismissing the writ of error, (b) without a formal hearing such as other litigants are afforded, (c) without opinion, (d) on a motion filed, entertained, and allowed in violation of its own rules, (e) after granting petitioners an extension of time in which to file abstracts and briefs which time would not expire until after the term at which the order of dismissal was entered; (f) in refusing to vacate the order of dismissal on a motion filed or presented for filing within thirty days after the order of dismissal was entered; and (g) in refusing to set aside a void order of dismissal at any time?

THE RULE OF DECISION IN ILLINOIS.

The Act of March 5, 1874, provided

"That *the common law of England*, so far as the same is applicable and of a general nature, and all statutes or acts of the British parliament made in aid of, and to supply the defects of the common law, prior to the fourth year of James the First [beginning March 24, 1606 and ending March 23, 1607], excepting the second section of the sixth chapter of 43rd Elizabeth, the eighth chapter of 13th Elizabeth, and ninth chapter of 37th Henry Eight, and

which are of a general nature and not local to that kingdom, *shall be the rule of decision*, and shall be considered as of full force until repealed by legislative authority." (Italics ours). Ch. 28, Ill. Rev. Stat. 1951.

WRIT OF ERROR IN ILLINOIS.

A common law writ of error is a new suit in Illinois, *Freeson* v. *Scott County Drainage & Levee District*, 283 Ill. 536. The assignments of errors are the pleadings. *Freeson* v. *Scott County Drainage & Levee District*, 283 Ill. 536. It has been abolished as a method of review in the ordinary civil proceeding and review by notice of appeal substituted. Sec. 74 Civil Practice Act, Sec. 198, Ch. 110 Ill. Rev. Stat. 1951. But "the rule is well settled that where a constitutional question first arises in the Appellate Court" the Supreme Court of Illinois "has jurisdiction to review the judgment of the Appellate Court, on writ of error. This rule has not been changed by the Practice Act." *Cummings-Landau Laundry Machinery Co.* v. *Koplin*, 386 Ill. 368, 373; *Sprague* v. *Goodrich*, 376 Ill. 80, 87. This review is mandatory. *Altschuler* v. *Altschuler*, 410 Ill. 169. The ninety day limitation on the right to appeal does not apply to a writ of error under such circumstances. *Altschuler* v. *Altschuler*, 410 Ill. 169. In the absence of legislation the limitation period is twenty years. *Peterson* v. *Manhattan Ins. Co.*, 244 Ill. 329, 334.

LIABILITY AND IMMUNITY OF PRIVATE CHARITABLE CORPORATIONS IN ILLINOIS.

Under the decisions of the Supreme Court of Illinois a private charitable corporation is subject to tort liability when it has insurance or other non-trust funds. *Moore* v. *Moyle,* 405 Ill. 555. In that case, the latest decision in Illinois on the question, the court declared: "From a careful analysis of the many cases, we are of the opinion that the law in Illinois is that *the trust funds of charitable corporations are immune from liability* for the torts of the corporation's employees and agents. *Beyond that, the rule of respondeat superior is in effect.*" It would seem to follow that a charitable corporation is liable to judgment in an action in tort but that its trust funds cannot be taken to satisfy the liability. But the Illinois Appellate Court, Second District, held in the instant case that it is not subject to liability when all of its assets are trust funds. *Slenker* v. *Gordon,* 344 Ill. App. 1. If that decision correctly states the Illinois law on the subject, it follows that judgment is limited to the amount of non-trust property in the possession of the charitable corporation at the time of trial. It further follows that a charitable corporation having no non-trust property is only subject to tort liability when and to the extent it carries liability insurance, i.e., voluntarily subjects itself to tort liability.

STATEMENT.

The facts and proceedings in the trial court are simply stated in the opinion of the Illinois Appellate Court (Rec. 6). Petitioners, Fred Slenker, and his wife, Elizabeth Slenker sued David W. Gordon and the Grand Lodge of the State of Illinois of the Independent Order of Odd Fellows to recover for personal injuries sustained by them on February 21, 1945, in a collision between their automobile and an automobile driven by Gordon. That suit was filed on May 19, 1945. The complaint was amended and a severance granted the defendant Gordon. It alleged that Gordon was at and before the time of the collision, the officer, agent and servant of the corporate defendant and alleged that the corporate defendant, through its said officer, agent and servant, Gordon, was guilty of the several acts of alleged negligence. The defendant in its answer averred that it was a charitable organization organized under a special act of the Legislature of the State of Illinois; that all of its objects and service were wholly charitable and as such it was not liable in anywise for the torts of Gordon or any of its servants. A reply was filed by the petitioners and, after the issues had been made up, a jury trial was had, resulting in a verdict finding the corporate defendant guilty and assessing the damages of petitioner, Fred Slenker, at $8,000.00 and assessing the damages of the petitioner, Elizabeth Slenker, at $16,000.00.

The jury, in addition to these general verdicts, also answered in the affirmative this special interrogatory, viz.: Was David W. Gordon at the time of the collision in question, in driving and operating his automobile, acting as an agent or servant of the defendant, Grand Lodge of the State of Illinois of the Independent Order of Odd Fellows, a corporation, and in the scope of his employment?

Thereafter the motion of the corporate defendant for a new trial was denied but its motion for judgment notwith-

standing the verdict was sustained, the trial court holding that defendant was a charitable organization and as such immune from tort liability. Judgment was rendered in favor of the corporate defendant and against petitioners in bar of the action and for costs. To reverse this judgment petitioners appealed to the Illinois Appellate Court, Second District (Rec. 142).

Appeal.

The Appellate Court held that the Grand Lodge is a charitable corporation (Rec. 17). The court said:

> "The appellee pleaded in its answer the defense that it was a charitable organization, that all its objects and service were wholly charitable and as such it was not liable for the torts of any of its agents and servants. The facts with reference to the funds of appellee were brought out in the evidence presented at the trial. The record in this case shows that appellee is a charitable organization and that all of the funds of the Grand Lodge of the State of Illinois of the Independent Order of Odd Fellows are trust funds devoted to the purposes of the Independent Order of Odd Fellows. This brings the case within the rule of the *Parks* case [*Parks* v. *Northwestern University*, 218 Ill. 381, 75 N.E. 991, 993, 2 L.R.A., N.S., 556] that the trust funds of a charitable institution must be protected. *Moore* v. *Moyle, supra* [*Moore* v. *Moyle*, 405 Ill. 555, 92 N.E. 2d 81], does not overrule the *Parks* case, but reaffirms the principles laid down in it. The trial court therefore properly entered judgment for the defendant notwithstanding the verdict and that judgment must be affirmed. In view of this conclusion, it is unnecessary to consider the other errors relied upon or the assigned cross-errors" (Rec. 24).

Petitioners filed a motion in the Appellate Court in proper time for a certificate of importance which, if granted, would automatically send the case to the Supreme Court of Illinois (Sec. 75, Civil Practice Act and Rules of Supreme Court [of Illinois], 1951) (Sec. 75 (2a), Ch. 110,

Ill. Rev. Stat. 1951). It was denied (Rec. 25-26). Petitioners next filed a motion in proper time in the Appellate Court for a certificate that the jurisdictional amount—$1,500.00—was involved (Sec. 75, Civil Practice Act and Rules of Supreme Court [of Illinois] 1951) (Sec. 199, Ch. 110, Ill. Rev. Stat. 1951), which was allowed (Rec. 26), and in proper time filed a petition with the Supreme Court of Illinois for leave to appeal (Rec. 27). It was denied (Rec. 27).

Petitioners then sued out a writ of error in the Supreme Court of Illinois on state and federal constitutional grounds (Rec. 1, 206), under the authority of *Altschuler* v. *Altschuler*, 410 Ill. 169, at 173-174.

Writ of Error.

This was the *first* time any constitutional question was raised in the case. The assignment of errors on writ of error alleged, in brief, that the trial court erred in entering the judgment notwithstanding the verdict and the Appellate Court erred in affirming that judgment and "coupled with the extinction of any possibility of correcting said errors by appeal" the State of Illinois had deprived plaintiffs of their fundamental right to have judgment entered on the verdict when the verdict was ripe for judgment thus depriving them of their personal security and property without due process of law and denied them the equal protection of its laws in violation of their federal rights under the 14th Amendment to the Constitution of the United States and that "any rule devised or applied by the courts of this state clothing a corporation organized for charitable purposes and not for profit with whole or partial immunity (a) to suit or (b) to judgment * * * in tort", would have the same result (Rec. 300, 302, 304).

Petitioners specifically pointed out "The Appellate Court erred in holding that because 'the trust funds of a

charitable institution must be protected, the trial court *therefore* properly entered judgment notwithstanding the verdict and that judgment must be affirmed", and in holding that a charitable corporation "*itself* is ever immune from judgment", and "it is necessary for the plaintiff to prove a defendant has non-trust property from which to pay a judgment before a judgment can be entered" (Rec. 300-301).

SPECIFICATION OF ERRORS.

1. The Supreme Court of Illinois erred in dismissing the writ of error and in refusing to vacate the order of dismissal.

2. The trial court erred in not entering judgment for plaintiff on the verdict.

3. The trial court erred in allowing defendant's motion for a directed verdict and for judgment notwithstanding the verdict.

4. The Appellate Court erred in affirming the judgment for defendant notwithstanding the verdict.

5. The trial court erred in holding that the doctrine of *respondeat superior* has no application to a corporation organized for charitable purposes and not for profit.

6. The trial court erred in holding that a corporation organized for charitable purposes and not for profit is not liable for torts committed by its employees or agents within the scope of their employment.

7. The Appellate Court erred in holding that because "the trust funds of a charitable institution must be protected" that "the trial court *therefore* properly entered judgment notwithstanding the verdict and that judgment must be affirmed".

8. The Appellate Court erred in holding that it is necessary for the plaintiff to prove a defendant has non-trust property from which to pay a judgment before a judgment can be entered in favor of a plaintiff in an action in tort against a corporation organized for charitable purposes and not for profit.

9. The Appellate Court erred in holding that a corporation organized for charitable purposes and not for profit *itself* is entitled to any immunity from tort liability whatsoever.

10. The Appellate Court erred in holding that a corporation organized for charitable purposes and not for profit *itself* is ever immune from judgment in an action in tort.

11. The Appellate Court erred in holding that payment of a judgment in a tort action from the trust property of a corporation organized for charitable purposes and not for profit would divert it from the purposes of the corporation.

12. The trial and Appellate Courts erred in holding that the record in this case shows that the defendant is a corporation organized for charitable purposes and not for profit.

13. The trial and Appellate Courts erred in holding that all of the property owned by the Grand Lodge of the State of Illinois of the Independent Order of Odd Fellows is trust property.

14. The Appellate Court erred in holding that evidence as to the manner in which property was held by defendant introduced for the purpose of determining whether defendant was a corporation organized for charitable purposes and not for profit could be used for the purpose of determining whether defendant owns any non-trust property.

15. That by reason of each of the errors committed by the trial and Appellate Courts as above specified, coupled with the extinction of any possibility of correcting said errors by appeal by the Appellate Court denying an application for a certificate of importance and the Supreme Court denying a petition for leave to appeal, the State of Illinois acting through its judicial department has deprived plaintiffs of their constitutional rights as hereinafter specified:

It has deprived the plaintiffs of their fundamental right to have judgment entered on the verdict when the verdict is ripe for judgment, in violation of Section 1 of the 14th Amendment to the Constitution of the United States, which provides that no state shall deprive any person of life, etc. person; or deny to any person within its jurisdiction the equal protection of its laws.

16. That the State of Illinois through the action of the Illinois Appellate Court in affirming the judgment of the trial court notwithstanding a verdict ripe for judgment under the ordinary rules of tort liability applicable to all other private persons, individual or corporate, in that jurisdiction, coupled with the extinction of any possibility of further review by appeal within the state judicial system without fault on the part of petitioners, constituted action by the State of Illinois depriving petitioners of their personal security and property without due process of law and denying to them the equal protection of its laws in violation of their federal rights under Section 1 of the 14th Amendment to the Constitution of the United States.

17. That the State of Illinois in developing the common law policy of the state in exempting to any extent a private charitable corporation from judgment on a verdict ripe for judgment under the ordinary rules of tort liability applicable to all other private persons, individual and cor-

porate, in that jurisdiction, and unknown to the common law of England on March 24, 1606, and May 6, 1776, and July 4, 1776, and the common law in America on July 28, 1868, has deprived petitioners of their personal security and property without due process of law and denied to them the equal protection of its laws in violation of their federal rights under Section 1 of the 14th Amendment to the Constitution of the United States especially since they were strangers to the institution.

18. That the State of Illinois in exempting the Grand Lodge of the State of Illinois of the Independent Order of Odd Fellows, a private charitable corporation not presently possessed of non-trust property at the time of trial from judgment on a verdict ripe for judgment under the ordinary rules of tort liability applicable to all other private persons, individual and corporate, in that jurisdiction, including private charitable corporations presently possessed of insurance or other non-trust property at the time of trial, deprived petitioners of their personal security and property without due process of law and denied to them the equal protection of its laws in violation of their federal rights under Section 1 of the 14th Amendment to the Constitution of the United States.

19. That the State of Illinois in developing the common law policy of the state had no right to set up as a test of liability of the Grand Lodge of the State of Illinois of the Independent Order of Odd Fellows to judgment in an action in tort possession by the corporation at the time of trial of non-trust property subject to being taken to

satisfy the judgment—a factor alien to any question of fault, damage, or right of satisfaction—and in applying the test to the petitioners' detriment deprived petitioners of their personal security and property without due process of law and denied to them the equal protection of its laws in violation of their federal rights under Section 1 of the 14th Amendment to the Constitution of the United States.

20. That the constitutional questions presented arose for the first time in the Illinois Appellate Court, Second District, upon extinction of any possibility of further review by appeal within the state judicial system without fault on the part of petitioners—contrary to the implied decision of the Supreme Court of Illinois that it did not—especially in view of the fact that the State of Illinois does not provide any adequate means by which the common law policy of the state may be challenged or tested or subjected to or governed by the requirements of Section 1 of the 14th Amendment to the Constitution of the United States relative to due process and the equal protection of the laws; and, as a consequence the Supreme Court of Illinois under its decision in *Altschuler* v. *Altschuler,* 410 Ill. 169, at 173-174, holding that a writ of error to review cases on constitutional grounds arising for the first time in the Illinois Appellate Courts was a matter of right without time limitation other than that applicable at common law to writ of error, i. e., twenty years, had no discretion in the matter but was required to hear the case and sustain the writ and erred in dismissing the writ of error thereby exhausting all possibility of further review in the state

judicial system and terminating any possibility of remedy in that state, the State of Illinois thereby depriving petitioners of their personal security and property without due process of law and denying to them the equal protection of its laws in violation of their federal rights under Section 1 of the 14th Amendment to the Constitution of the United States.

21. That the State of Illinois acting through its judicial department deprived petitioners of their personal security and property without due process of law and denied them the equal protection of its laws in violation of their federal rights under Section 1 of the 14th Amendment to the Constitution of the United States by the action of the Supreme Court of Illinois in (a) dismissing the writ of error, (b) without a formal hearing such as other litigants are afforded, (c) without opinion, (d) on a motion filed, entertained, and allowed in violation of its own rules, (e) after granting petitioners an extension of time in which to file abstracts and briefs which time would not expire until after the term at which the order of dismissal was entered, (f) in refusing to vacate the order of dismissal on a motion filed within thirty days after the order of dismissal was entered, and, (g) in refusing to set aside a void order at any time.

Reasons Relied On for Allowance of Writ.

I.

The State of Illinois provides no means by which the common law policy of that state may be challenged or tested or governed by or subjected to the Fourteenth Amendment.

It has long been recognized that the action of state courts in enforcing a substantive common-law rule formulated by those courts, may result in a denial of rights guaranteed by the Fourteenth Amendment. *Shelley* v. *Kraemer*, 334 U.S. 1, 14-18. It follows that the state courts must provide some method by which the substantive common-law rules formulated by the state courts may be challenged or tested or governed by or subjected to the Fourteenth Amendment. The issues here are similar to the issues in that case except there the state supreme courts rendered opinions and enforced the common law rule complained of while here the Supreme Court of Illinois rendered no opinion and simply refused to disturb the decision of the Appellate Court. Review "on the question of constitutionality of procedure or result must be permitted when fundamental rights are involved." *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U.S. 287 at 289. Mott, Due Process, p. 239 n. 67. And if the state courts do not do so it is incumbent upon this Court to review the case.

But the State of Illinois provides no adequate means by which the common-law policy of the state may be challenged or tested or governed by or subjected to the 14th Amendment. This is shown by a consideration of the action of the Supreme Court of Illinois in dismissing the writ of error on motion in the instant case and decisions of that court in other cases, especially *Moore* v. *Moyle*, 399 Ill. 250, 405 Ill. 555; *McIlvaine* v. *City Nat. Bank*, 371 Ill.

565; and *Hass Electric Co.* v. *Amusement Park Co.*, 236 Ill. 452.

In *Moore* v. *Moyle*, 399 Ill. 230, the plaintiff Moore took a direct appeal to the Supreme Court of Illinois on the ground that the common law rule of that state granting immunity to tort liability to charitable corporations violated her federal rights under the due process and equal protection clauses of the 14th Amendment when applied to prevent her from maintaining an action based on *respondeat superior* against a charitable corporation. The constitutional question was raised in the trial court by a timely motion to vacate an ORDER striking the complaint. The court held that no constitutional question was presented and transferred the cause to the Appellate Court of Illinois for determination. The court said:

> "Where a judgment or decree is attacked on the grounds that its enforcement will deprive the one against whom it is sought to be enforced of some constitutional right no constitutional question is presented which authorizes a direct appeal to this court. The question involved in such a case is the validity of the judgment or decree and *is not a constitutional question* within the meaning of the statute which authorizes a direct appeal to this court * * * *The issue is rather the correctness or incorrectness of the order and judgment of the trial court.* Of this we have no jurisdiction on direct review." (Italics ours.)

On subsequent appeal to the Supreme Court of Illinois on a certificate of importance from an adverse Appellate Court ruling counsel argued at page 74 of the Brief and Argument of Appellant (Rec. 66):

> "This court [Supreme Court of Illinois] held when plaintiff sought to have the decision of the lower court reviewed directly by this court that no constitutional question was involved 'within the meaning of the statute which authorizes appeals direct to this court.' *Moore* v. *Moyle*, 399 Ill. 230. But this court did not

> decide whether plaintiff was deprived of her constitutional rights. That question remains to be determined."

In the opinion in *Moore* v. *Moyle*, 405 Ill. 555, the decision on that second appeal the court in answering that contention made only the following comment, concerning the constitutional issues:

> "From that judgment appellant came here on direct appeal contending constitutional questions were involved. This court found no fairly debatable constitutional questions were presented and ruled on in the trial court, so as to give this court jurisdiction on direct appeal, and that the question presented was whether the judgment of the trial court was correct. *Moore* v. *Moyle*, 399 Ill. 230, 77 N.E. 2d 651."

It appears that the phrase "within the meaning of the statute which authorizes appeals direct to this court" adds nothing to the statement "is not a constitutional question."

In *People ex rel. Tinkoff* v. *Northwestern University*, 396 Ill. 233; *Chapralis* v. *City of Chicago*, 389 Ill. 269; *In re Paus' Estate*, 385 Ill. 550; *Perlman* v. *Thomas Paper Stock Co.*, 378 Ill. 238; and *De LaCour* v. *De LaCour*, 363 Ill. 545; the court reached the same conclusion as it reached in *Moore* v. *Moyle*, 399 Ill. 230.

The *ratio decidendi* has been clearly stated by the Supreme Court of Illinois: "If error was committed by the circuit court it can be *corrected* in the Appellate Court." *Riddlesbarger* v. *Riddlesbarger*, 410 Ill. 392. Or as it said in *McIlvaine* v. *City Nat. Bank and Trust Co.*, 371 Ill. 565; and *In re Paus' Estate*, 385 Ill. 550:

> "If errors are committed or erroneous or unjust decisions are rendered they may be *corrected* in the manner provided by law for the *correction* of such errors, but *mere* error in a judgment or decree does

not deprive the losing party of the benefit of due process of law. *Foreman-State Nat. Bank* v. *Sistek*, 35 525, 193 N.E. 513."

(Italics in above paragraph ours.)

It follows that in Illinois no constitutional question can arise in either the trial or appellate courts as to the validity of a rule of common law (as distinguished from a statutory enactment) as long as there is a possibility to appeal the case within the state judicial system. Until the possibility of further appeal is extinguished the issue is the correctness or incorrectness of the decision of the trial court or the Appellate Court. Until that happens there is nothing except "*mere error*" that may be corrected in the manner provided by law for the correction of such errors.

The holdings of the Supreme Court of Illinois that no constitutional question arises in a case at common law until all possibility of appeal is extinguished is consistent with the manner in which the common law of the State of Illinois and the common law of any other common law jurisdiction is developed. Until the highest court in the state has declared the common law policy of the state the declaration of what the common law of that particular jurisdiction is merely tentative. It is not law until all possibility of appeal to the highest court of the state has been exhausted. And then it only becomes the law of the land as distinguished from being the law of the case to the extent it does not conflict with decisions made by the Supreme Court of the state. Only when the decision becomes final in the sense that further appeal within the state judicial system is impossible has there been or can there be any deprivation of right as far as the litigant is concerned in a permanent sense. If he does not exhaust all possible methods of obtaining review by appeal he

acquiesces in the judgment and waives his constitutional rights.

As a practical matter it makes little difference when the courts of a state determine when a constitutional question arises for the first time provided that the courts consistently apply the same rule. But the judicial system of a state should be required to uniformly apply the same rule in all cases. There is no doubt that a constitutional question arises in the trial court when a statute is involved because that declaration of law is not subject to change at the whim of the judiciary. But in the case of a rule at common law it is subject to change by judicial decision. The courts of the State of Illinois could have adopted the view that a constitutional question arose in the trial court. But they have not done so and the distinction between the nature of a statute and the position of the courts in regard thereto and the nature of a common law rule and the position of the courts in regard thereto may justify the courts in declaring a different rule in regard to when the court's constitutional question arises as a result of their enforcement. And having once adopted a rule as to when a constitutional question arises as a result of the enforcement of a common law rule which is different from that applicable to the enforcement of a statute it must be adhered to. And if it is, no one can make any justifiable complaint concerning it.

But the Supreme Court of Illinois has developed another rule that must be considered. It has repeatedly held that if a case is taken directly to the Appellate Court and there are questions other than the constitutional questions raised of which that court has jurisdiction the constitutional questions are waived. *Hass Electric Co.* v. *Amusement Park Co.*, 236 Ill. 452; *Luken* v. *Lake Shore & Michigan S. Ry. Co.*, 248 Ill. 377. These are the cases cited by

respondents in their suggestions to their motion to dismiss the writ of error (Rec. 36) and in the absence of any opinion must be taken to be the basis on which the Supreme Court of Illinois acted in dismissing the writ of error and in refusing to vacate the order of dismissal in view of the fact, as has been shown, that the writ of error was not barred by limitations.

The application of the two rules in the instant case shows precisely what happens: on direct appeal no constitutional question is involved: on indirect appeal the constitutional question is waived. Under such circumstances it would be an idle gesture (as it was in *Moore* v. *Moyle*, 399 Ill. 230, 405 Ill. 555) to make any contention in the trial court that a rule declared by the Supreme Court of the State of Illinois to be the common law of that jurisdiction is unconstitutional. Consequently, no attack can successfully be made [redacted] against a common law rule of the State of Illinois on constitutional grounds, and the common law policy of the state for all practical purposes is unfettered by constitutional limitations.

There are only two ways in which that result can be avoided: (a) to hold that the constitutional question arises for the first time in the Appellate Court when all possibility of further appeal is exhausted, or (b) to hold that the constitutional question arises in the trial court. But it is absolutely impossible to avoid the result reached in the instant case as long as the Supreme Court of Illinois holds that no constitutional question is present while there is a possibility of appeal on the one hand, thus barring direct appeal to the Supreme Court of Illinois, and that by taking the case to the Appellate Court in the first instance the litigant waives the constitutional questions, thus barring their ultimate determination on the other.

It is submitted that the law in Illinois concerning constitutional questions is as badly muddled as its criminal

procedure with which the Court has had occasion to be familiar. The Petition for Writ of Certiorari should be granted and the Supreme Court of Illinois and the State of Illinois be required to provide for adequate review of the common law policy of the state when such policy is challenged on federal constitutional grounds. The matter is one of national importance.

The means is at hand. The two lines of cases indicated can only be reconciled on the hypothesis that no constitutional question is presented by a case involving the common law policy of the state in either the trial or intermediate Appellate Court until all possibility of further appeal to the state court of last resort is extinguished. If that view be adopted it would follow that the constitutional questions in the instant case arose when without any fault on the part of petitioners all chance of correcting the errors committed by the trial and appellate courts was extinguished by the concurrent action of the Appellate Court and the Supreme Court of Illinois in closing the road to further review by appeal. Of course denial of a certificate of importance and denial of leave to appeal did not constitute the denial of any constitutional right since the issuance of a certificate of importance or the granting of leave to appeal is entirely a matter of judicial discretion. But that denial extinguished all possibility of correcting the errors by appeal and acted as a catalyst whereby the action of the trial court and of the Appellate Court became the final action of the courts of the State of Illinois and the State of Illinois as to common law policy and a denial of constitutional right by the courts of the State of Illinois and the State of Illinois.

The Illinois rule being well settled that where a constitutional question first arises in the Appellate Court the Supreme Court of Illinois has jurisdiction to review the

judgment of the Appellate Court on writ of error (*Cummings-Landau Laundry Machinery Co.* v. *Koplin*, 386 Ill. 368; *Goodrich* v. *Sprague*, 376 Ill. 80; *Corcoran* v. *City of Chicago*, 373 Ill. 567; *Burket* v. *Reliance Bank and Trust Co.*, 366 Ill. 120; *Segal* v. *Chicago City Railway Co.*, 325 Ill. 43) even after 90 days (*Altschuler* v. *Altschuler*, 410 Ill. 169, 173-174) the solution suggested would solve the procedural difficulty.

The problem is worthy of the consideration of this Court and a decision by this Court would tend to correct similar situations in other states than Illinois having intermediate Appellate Courts of limited jurisdiction to decide constitutional questions.

II.

Fairly debatable federal constitutional questions of importance involving fundamental rights of the individual are presented for decision which this Court alone has the ultimate power to decide and the determination of which will effect the law of about thirty-two states which hold that under the common law policy of the state private charitable corporations are entitled to full or limited immunity to judgment in an action in tort under circumstances in which any other private person, individual or corporate, would be liable to judgment.

Fairly debatable federal constitutional questions are presented for decision (Rec. 206, 307). These are important because they involve fundamental rights of the individual (Rec. 60-65). This Court alone has the ultimate power to decide them. Their determination will affect the law of about thirty-two states which hold that under the common law policy of the state private charitable corporations are entitled to full or limited immunity to judgment in an action

in tort under circumstances in which any other private person, individual or corporate, would be liable to judgment (Rec. 47-59). A decision by this Court would be a landmark case tending to establish just how far a state may go in exempting any person from the ordinary rules of tort liability as a part of the common law policy of the state without violating the constitutional rights of the complainant under the 14th Amendment to the Constitution of the United States.

III.

Immunity of a private corporation to judgment in an action in tort is without foundation in the common law and bars the enforcement of fundamental rights and requires an injured person who otherwise would be entitled to judgment under the ordinary rules of tort liability applicable for or against all other private persons, individual or corporate, in the same circumstances to make an unreasonable contribution to the charitable corporation against his will and is most unreasonable when applied against a stranger to the institution or when immunity is limited to corporations not presently possessed of insurance or other non-trust property. The State of Illinois, therefore, in enforcing any immunity to judgment deprives an injured person of his fundamental right to personal security and property without due process of law and denies to him the equal protection of its laws in violation of the Fourteenth Amendment.

A. Immunity has no foundation in the common law.

The idea that a corporation is to be treated as a natural man is the only theory about the personalty of corporations that the common law has ever possessed. Holdsworth states: "The idea that the corporation is to be treated as

far as possible like a natural man is the only theory about the personalty of corporations that the common law has ever possessed." (History of English Law, 3rd. Ed., Vol. 9, p. 70): "So far as criminal or civil liability is concerned, the courts have always been prepared to hold that a corporation is as capable of being held liable as a natural person." (Ibid. pp. 51-52). Blackstone says that every corporation has the power "To sue or be sued * * * as natural persons may"; and that power is "inseparably incident to every corporation and of course tacitly annexed." (Bernard C. Gavit, Blackstone's Commentaries on The Law, pp. 211-212; 208-210). Holdsworth says: "It was well recognized that the king's charter could neither change the common law, nor alter the rights and duties of private persons fixed by law. To hold, therefore, that the king could neither give nor take away powers from a corporation which he could not give or take away from a natural man, was quite in accordance with the constitutional doctrine. But, if this was so, it followed that those powers and capabilities were not only incidental, they were also inseparately annexed." (Holdsworth, History of English Law, 3rd Ed., Vol. 9, p. 55). In general "the rights, powers, and liabilities of the corporations are, as far as they exist, identical with those of the man." Joel Prentiss Bishop, Non-Contract Law (1889), pp. 332-333, Holdsworth says: "The *common law*, without indulging in much speculation as to the nature of a corporation's personalty, has evolved the *common sense view* that a corporation has, so far as is consistent with its artificial nature and with the purpose with which it is created, the capacities and *liabilities* of a *natural man*." Holdsworth's Essays in Law and History, pp. 211-212. (Italics ours.) "The treatment is consonant with popular ideas and speech wherein corporate bodies are freely personified." It has been accomplished "by the simple extension of the legal principles of agency." Encyclopedia

Britannica, 14th Ed., Vol. 6, p. 464. "If it is once granted", said Lord Lindley in his decision in *Citizens Life Assurance Co.* v. *Brown* (1904), A.C. 423, 426, "that corporations are for civil purposes to be regarded as persons, i.e., as principals acting by agents and servants, it is difficult to see why the ordinary doctrines of agency are not to be applied to corporations as well as ordinary individuals." The maxim, *respondeat superior*, is founded on the principle that every man in the management of his own affairs, whether by himself or his servants, shall so conduct himself as not to injure another. *Harding* v. *St. Louis Stockyards*, 242 Ill. 444. The master is not liable because of the authority given to the servant nor because the servant had been negligent, "But because he is conducting the master's affairs, and the master is bound to see that his affairs are so conducted that others are not injured." In other words, the rule is based on a "great principle of social duty", adopted "from general considerations of policy and security." Chief Justice Shaw in *Farwell* v. *Boston & Worcester R.R. Corp.*, 4 Metcalf 49, quoted with approval in *Standard Oil Co.* v. *Anderson*, 212 U. S. 215. In *Nevins* v. *City of Peoria*, 41 Ill. 502, Mr. Justice Lawrence said:

> "In our opinion, the theory that private rights are ever to be sacrificed to public convenience or necessity, without full compensation, is fraught with danger and should find no lodgment in American jurisprudence. To prevent this was the object of some of the most important of our constitutional guarantees. [Unless] protection [is found] in the courts our institutions have failed in their great purpose—the complete security of private rights * * * if an individual, exercising his lawful powers, commit an injury, the action on the case is the familiar remedy; if corporations acting within the scope of their authority should work ill to another, the same principle of *ethics* demands of them to repair it, and no reason occurs to the court why

the same remedy should not be applied to compel justice from them." (Italics ours.)

Charitable corporations are private if the foundation is private. "This is the unequivocal doctrine of the authorities; and cannot be shaken but by undermining the most solid foundations of the common law." *Dartmouth College* v. *Woodward,* 4 Wheat. (U.S.) 518, 670 (Mr. Justice Story); *Washington Home* v. *City of Chicago,* 157 Ill. 414. It follows that such a corporation is a private and not a public person.

The common law did not except a private charitable corporation from these general rules (Rec. 52-57). It is plain that the rule that a corporation should be treated as a natural person was first applied to a corporation organized for charitable purposes and not for profit (Rec. 52) and an abbott, a monastic corporation sole and consequently a charitable corporation, was liable for the torts of his monks as early as 1485 (Y.BB 48 Edward III, Mich. pl. 10; 49 Edward III, Mich. pl. 5; Holdsworth, History of English Law, 3rd Ed., Vol. 3, pp. 471, 473-4, 488; Pollock and Maitland, History of English Law, 2nd. Ed., Vol 1, 433, 438, 435-6; Rec. 53-55). Since the abbott was a monk (Rec. 53) he was civilly dead (Rec. 53) and was propertyless (Rec. 54) it follows that his liability for the torts of his monks was against him in his corporate capacity and was satisfied out of the assets of the monastic corporation (Encyclopedia Americana, 1942 Ed., Vol. 1; Pollock and Maitland, History of English Law, 2nd Ed., Vol. 1, pp. 433, 492) (Rec. 55). Consequently charitable corporations were liable in tort. This conclusion is confirmed by the development of the common law in England (1866) (Rec. 56), New Brunswick (1890), Ontario (1915), and New Zealand (1935) (Rec. 55) and in seventeen American jurisdictions: Rhode Island (1879), New Hampshire (1906), Alabama (1915), Minne-

sota (1920), New York (1937), California (1939), Utah (1940), Oklahoma (1940), Florida (1940), District of Columbia (1942), North Dakota (1946), Puerto Rico (1948), Vermont (1950), Iowa (1951), Arizona (1951), Delaware (1951), and Mississippi (1951) (Rec. 56-58); and by decisions in eleven American jurisdicitions: Michigan (1907), Indiana (1909), Virginia (1914), Nebraska (1918), North Carolina (1929), Nevada (1929), Ohio (1930), Connecticut (1931), Louisiana (1934), Washington (1940), and New Jersey (1948) (Rec. 58-59) holding the charitable corporations liable to strangers, Contract or implied contract being the basis on which non-liability to beneficiaries is predicated; and as far as liability to judgment is concerned by decisions in two other American jurisdictions, Tennessee and Colorado (Rec. 47-48).

B. Immunity bars the enforcement of fundamental rights and requires the person injured to make a contribution to the charitable corporation against his will.

"Every man's person is sacred." Bernard C. Gavit, Blackstone's Commentaries, 556-559. It follows that the right of personal security is an absolute right, inherent and inalienable, which does not need to be sacrificed by the laws of society to public convenience and avails against all persons whomsoever. Bernard C. Gavit, Blackstone's Commentaries on The Law, pp. 68-71; *The Wabash, St. Louis and Pacific Railway Company* v. *Shacklet* (1883), 105 Ill. 364, 379. "Every man has a property right in his own person." Walter H. Hamilton, Property According to Locke, 1932, 44 Yale L.J. 864; Selected Essays on Constitutional Law, Vol. 2, pp. 115, 119. It follows that one of the primary rights of a citizen is indemnity against personal injuries occasioned by the negligence of others, i.e., redress in the ordinary forms of law—vindication by the regular administration of justice in the courts of law—and that

this right of indemnity avails against all persons whomsoever. Bernard C. Gavit, Blackstone's Commentaries on The Law, pp. 76, 556-559; *The Wabash, St. Louis and Pacific Railway Company* v. *Schacklet* (1883), 105 Ill. 364, 379; *Prouty* v. *City of Chicago*, 250 Ill. 222.

Immunity bars the enforcement of these rights. It compels "the persons damaged to contribute the amount of their loss to the purpose of the * * * corporation" (*Mulliner* v. *Evangelischer Diakonniessenverein*, 144 Minn. 392, 397-8), which is "*an unreasonable contribution to the charity, against his* [*their*] *will*," (*Silva* v. *Providence Hospital of Oakland*, 14 Cal. (2d) 762, 775-776) for "No conception of justice demands that an exception to the rule of *respondeat superior* be made in favour of the resources of a charity and against the person of a beneficiary [or other person] injured by the tort of a mere servant or employee functioning in that character." *Sheehan* v. *North Country Community Hospital* (1937), 273 N.Y. 163, 164, and "If beneficiaries and servants of charities, and third persons, are killed or injured, or their property injured or destroyed, and no recompense is given from any source, the result is apt to be that a certain number of persons will become public charges and a feeling of social injustice will be implanted in the minds of the victim." (Bogert, Trusts and Trustees, ... Ed., Vol. 2, Sec. 401). It is "an anomaly" which is gradually being broken down and "this leaves the steps untaken [to abolish it] as the more anomalous." *President and Trustees of Georgetown College* v. *Hughes* (1942), 130 F. 2d 810, 814-15. It is invidious and mischievous.

C. Immunity is most unreasonable when applied against a stranger to the institution or when immunity is limited to corporations not presently possessed of insurance or other non-trust property.

It is particularly unreasonable when applied against a stranger to the institution. In *Henry W. Putnam Memorial Hospital* v. *Allen*, 34 F. 2d 927, 929-30 (C.C.A. 2d Vt.), the court said: "irresponsibility should not be extended to the tortious infliction of damage upon strangers. To hold that a charitable institution, whose agent negligently runs down a pedestrian upon the street, need not respond in damages, although the circumstances are such as would render any other defendant liable, seems to us *a monstrous doctrine* [Italics ours]. * * * in our opinion no adequate reason has been, or can be, advanced for allowing the purpose of the settlor of trust funds to introduce into the law a principle which to us, appears so anomalous and unjust." That it is particularly unreasonable in such a case is shown by the fact eleven American jurisdictions which erroneously enforce immunity against beneficiaries permit recovery by a stranger (Rec. 58-59).

It seems particularly unreasonable to recognize any immunity where the State has already held that a private charitable corporation having liability insurance coverage or possessed of other non-trust property is subject to judgment as Illinois did in *Moore* v. *Moyle*, 405 Ill. 555. In such case the argument for granting immunity is even more specious than the argument for granting immunity in all cases. The reasoning of the Illinois Appellate Court's opinion in this case (Rec. 6-24) with particular reference to the last four paragraphs of the opinion (Rec. 23-24) is logically unsound. The court presupposes that if a judgment were rendered the trust property would be taken on execution to satisfy the judgment and since the Supreme Court of Illinois has held that the trust assets must be protected it follows that the judgment cannot be entered. But that is not true, it does not follow that because a judgment is rendered that the judgment creditor is entitled to execution. For example in Illinois there is no contingency

in which an execution may be awarded or issued against a municipal corporation (Freeman, Law of Execution, 3rd Ed., 1900, Vol. 1, pp. 537-538), and this is the general rule in other jurisdictions (Ibid., pp. 67-68). See *City of Chicago* v. *Halsey*, 25 Ill. 485. "The award of execution to produce satisfaction constitute(s) no part of the judgment": the judgment "simply contains the conclusion of 'law upon the facts proved, and leaves the party to his legal and appropriate writ to enforce it'." Freeman on Judgments, 4th Ed., 1892, p. 3. It further presupposes that if execution be awarded that the trust property could be taken to satisfy the liability. The decision of the Supreme Court of Illinois in *Moore* v. *Moyle*, 405 Ill. 555, is sufficient authority that it could not. (Frankly, although it is not necessary to a decision in this case, petitioners believe that in the present case they have a right to execution and that any limitation on the right to take the so-called trust property would deprive them of their constitutional rights. But that does not affect the unsoundness of the reasoning upon which the opinion of the Illinois Appellate Court in the instant case is predicated.) The rule announced by the Illinois Appellate Court makes the entry of judgment and the amount of the judgment depend upon a factor totally alien to the questions of fault, tort liability, damages and right to satisfaction (*Anderson* v. *Armstrong*, 180 Tenn. 56; *St. Mary's Academy of Sisters* v. *Solomon*, 177 Colo. 463; *Shurleff* v. *Wiscasset*, 74 Me. 140; *Hopkins* v. *Clemson Agricultural College*, 221 U.S. 636) (Rec. 47-48).

A judgment establishes (a) the right to recover from the defendant, (b) the amount of the damages sustained by the plaintiff, (c) his right to supplemental proceedings to discover and reach property belonging to the judgment debtor to satisfy the liability, (d) preserves his right to satisfaction until barred by statute or rule of common law,

and (e) preserves his right to revive the judgment. All these benefits are denied the plaintiff under the rule established by the Appellate Court of Illinois in this case. For the reasons stated immunity in the instant case is utterly unreasonable and discriminatory.

D. Illinois, therefore, in enforcing any immunity to judgment deprives an injured person of his fundamental right to personal security and property without due process of law.

The purpose of the due process clause was to afford immunity from any violation of fundamental right. The first use of the phrase "life, liberty, and property without due process of law" in this country appears in the Fifth Amendment to the Constitution of the United States. It had appeared in an act of October 12, 1692, Art. 5 (Acts and Resolves of the Province of Massachusetts Bay, Vol. I, Chap. 11, Art. 5, p. 40) of the General Court of Massachusetts Bay. In England it appears in the statute of 28 Edward III (Statutes at Large of Great Britain and Ireland, Vol. 1, p. 643). Before the adoption of the Fifth Amendment colonial declarations of rights of the colonies had for the most part used the phrase of Magna Charta, "law of the land". It is now the law of the United States that the phrases "law of the land" and "due process of law" were intended to be synonymous (*Greene* v. *Briggs*, 1 Curtis (U.S.) 311; *Murray* v. *Hoboken Land and Improvement Company*, 18 How. (U.S.) 272; *Davidson* v. *New Orleans*, 96 U.S. 97; *French* v. *Barber Asphalt Paving Company*, 181 U.S. 324; *Twining* v. *New Jersey*, 211 U.S. 78.

The phrase "due process of law" was not limited by anything short of the general purpose to afford immunity from any violation of fundamental rights. Charles E.

Hughes, The Supreme Court of the United States, 1927, pp. 185-188; *Chicago B. & Q. R.R.* v. *Chicago,* 166 U.S. 226, at 235; *People ex rel. Joyce* v. *Strasheim,* 242 Ill. 359.

Due process requires that every citizen shall have the protection of the general rules that govern society—that is established principles of private rights and distributive justice. Webster's argument, *Dartmouth College* Case, 4 Wheat. 518, 581-582; *Bank of Columbia* v. *Okely,* 4 Wheat. 235, at 244.

The fundamental rights protected by the due process clause are determined from an examination of the principles of the common law of England acted upon by the colonists after the settlement of this country. In *Murray's Lessee* v. *Hoboken Land and Improvement Co.,* 18 How. (U.S.) 272 it was definitely recognized that the principles of the common law are to be considered the acid test of what procedure was or was not due process of law. (Mott, Due Process, 245) *Davidson* v. *New Orleans,* 96 U.S. 97, and *Hurtado* v. *California,* 110 U.S. 516, likewise so hold. See also *Westervelt* v. *Gregg,* 12 N. Y. 202, In *re Peterson,* 253 U.S. 300.

Looking to the English law we find that under that law it was said as early as the reign of Edward III (when the phrase "due process" was first used) a statute would be void if it was against common right, and under Henry VI (1422-1461) an act giving summary powers of confiscation to a corporation of dyers in London was held to be against the law of the land (Mott, Due Process, Sec. 20). By the time of the Stuarts it was axiomatic that all trials must conform to a regular form of legal procedure. James I recognized this as essential to all judgments in a speech in the Starre-Chamber in 1616 (C. H. McIlwain, Political Writings of James I, Vol. 1, pp. 326-340).

Therefore those laws which discriminate as to remedies in the courts must certainly be considered contrary to due process. Mott, Due Process, 293. While the Fourteenth Amendment does not prevent a state from prescribing a reasonable and appropriate condition precedent to the bringing of a suit of a specified kind or class so long as the basis of distinction is real and the condition imposed has reasonable relation to a legitimate object (*Jones* v. *Union Guano Co., Inc.*, 264 U.S. 171, 44 S. Ct. 280, at 282), those laws which discriminate as to remedies in the courts are invalid. *Forbes Pioneer Boat Line* v. *Board of Commissioners*, 258 U.S. 338, 42 S. Ct. 325.

Truax v. *Corrigan*, 257 U.S. 312, condemned the *legislative action* of a state which stripped an injured party of all real remedy as being at variance with the principles of due process, stating that the legislative power of a state could only be exercised in subordination to the fundamental principles of right and justice which the guarantee of due process was intended to preserve, and that a purely arbitrary or capricious exercise was violative of due process. It is also well settled that the action of state *courts* in enforcing a substantive common-law rule formulated by those courts may result in the denial of rights guaranteed by the Fourteenth Amendment even though the judicial proceedings in such cases may have been in complete accord with the most vigorous conceptions of procedural due process. *Shelley* v. *Kraemer*, 334 U.S. 1, 14-18; *C. B. & Q. R.R.* v. *Chicago*, 166 U.S. 226.

It follows that a state acting through its judiciary may not deprive a person of all existing remedies for the enforcement of a right which the state has no power to destroy without giving him some real opportunity to protect it. *Brinkerhoff-Faris* v. *Hill*, 281 U.S. 673.

The violation of these principles in the instant case was called to the attention of the Supreme Court of Illinois in the suggestions to the motion to vacate the order dismissing the writ of error (Rec. 72-79), but that court apparently did not note their application to this case.

We have established here as we did before that court that the purpose of the due process clause was to afford immunity from any violation of fundamental right; the meaning of due process is that every citizen shall have the protection of the general rules that govern society—that is the established principles of private rights and distributive justice; the fundamental rights protected by the due process clause are determined from an examination of the principles of the common law of England acted upon by the colonists after the settlement of this country; the action of state courts in enforcing a substantive common-law rule formulated by them may result in a denial of rights guaranteed by the Fourteenth Amendment even though the judicial proceedings in such cases may have been in accord with the most vigorous conceptions of procedural due process; and that a state acting through its judiciary may not deprive a person of all existing remedies for the enforcement of a right which the state has no power to destroy without giving him some real opportunity to protect it.

The decision in *Nicholson* v. *Good Samaritan Hospital,* 145 Fla. 360 (1940) holds that the rule violates due process of law and should be conclusive in this case since our Constitution has a provision similar to the one on which the Florida decision is based. In that case an action was filed against the hospital for the recovery of damages alleged to have been sustained by a patient as a result of the negligence of the nurses employed by the defendant. The declaration tested by the rules obtaining in ordinary cases

not involving charitable institutions showed a right of action, but the defendant sought exemption from liability on the ground that it was engaged in the business of conducting a charitable hospital. The court said at page 367:

> "While our Constitution exempts charitable corporations from taxation, nothing appears in the Constitution, statutes or judicial decisions of this State with regard to the exemption of charitable institutions from liability for the torts of their servants. However, we do find set out in the organic law of our State the following:
>
> " 'All courts in this State shall be open, so that every person for any injury done him in his lands, goods, or person or reputation shall have remedy, *by due course of law, and right and justice shall be administered without* sale, *denial*, or delay.' " (Italics supplied.) Declaration of Rights, Sec. 4, Constitution.
>
> "Thus it would appear that the public policy of this State as enumerated by its Constitution, is to put justice 'by due course of law' above or before charity. As stated by the Court in *Sheehan* v. *North County Community Hospital*, 273 N. Y. 163, 7 N.W. (2d) 28: '. . . to impose liability is to beget careful management; and that no conception of justice demands that an exception to the rule of respondeat superior be made in favor of the resources of a charity and against the person of a beneficiary injured by the tort of a mere servant or employee functioning in that character.'
>
> "There is no doubt but that the public has an interest in the establishment and maintenance of charitable institutions, whose beneficent value is generally recognized and appreciated, but it also has an interest in obliging corporations undertaking the performance of charitable duties, vitally affecting the lives and health of our citizens, to perform them carefully, and therefore the public also has an interest in this matter of exempting a charitable corporation from liability for its negligence. A charitable institution should be just before being charitable or generous.
>
> "The quotation from *Sheehan* v. *North County Community Hospital, supra*, recognizes the fact that to

> exempt charitable institutions from liability for the torts of their servants is to create an exemption to the well-founded and salutary doctrine of respondeat superior, which doctrine is in this State so much a part of 'due course of law', referred to in the above quoted section of our Constitution, as to require its recognition in cases of this kind in the absence of legislation to the contrary. There is no legal principle which would justify this Court in making such an exception, in view of the above quoted constitutional provisions. The creation of such exemption is a legislative prerogative."

These principles of the common law have the sanction of settled usage in England and in this country. They are part of the general rules that govern society, that is, they are established principles of private right and distributive justice and are, therefore, part and parcel of what is deemed "due process of law."

> "It seems to us that a statute which declares in terms and without more that the full and exclusive title of a described piece of land, which is now in A, shall be and is hereby vested in B, would if effectual, deprive A of his property without due process of law." *Davidson* v. *New Orleans,* 96 U.S. 102.

In *Silva* v. *Providence Hospital of Oakland* (1939), 14 Cal. (2d) 762, 775-776, 97 P (2d) 798, 804-805, the court said:

> "To require an injured individual to forego compensation for harm, when he is otherwise entitled thereto, because the injury was committed by the servants of a charity, is to require him to make an unreasonable contribution to the charity, against his will, and a rule of law imposing such burdens cannot be regarded as socially desirable nor consistent with sound policy."

In *Mulliner* v. *Evangelischer Diakonniessenverein* (1920), 144 Minn. 392:

> "We do not approve the public policy . . . which would compel the persons damaged to contribute their

loss to the purpose of even the most worthy corporation."

In *Hopkins* v. *Clemson Agricultural College* (1911), 55 U.S. Sup. Ct. R., L Ed. p. 890 the court said:

> "If the state had in so many words granted the college authority to take or damage the plaintiff's property for its corporate advantage without compensation, the Constitution would have substituted liability for the attempted exemption."

Yet here petitioners who have shown that the verdict in their favor was ripe for judgment according to the course and usage of the common law, that it is a fundamental right because it is the right of personal security itself that is involved which avails against all persons whomsoever, that there was no error in the trial which would invalidate that verdict and that defendant was not immune from judgment in an action in tort, find that the courts of Illinois have finally barred the door to the correction by further appeal of the error of denying them judgment and thus finally deprived of their constitutional rights by the State of Illinois. They are thus compelled to seek the vindication in this Court of their right to due process of law under the Fourteenth Amendment.

E. The State of Illinois, therefore, in enforcing any Immunity to Judgment denies to an injured person the equal protection of its laws.

Section 1 of the 14th Amendment provides: "No State shall * * * deny to any person within its jurisdiction the equal protection of the laws." Mr. Justice Matthews, in *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369, said this was "a pledge of the protection of equal laws." Chief Justice Taft, in *Traux* v. *Corrigan*, 257 U.S. 312, 338, said: "Our whole system of law is predicated on the general fundamental principle of equality of application of the law. 'All men

are equal before the law,' 'This is a government of laws and not of men,' 'No man is above the law,' are all maxims showing the spirit in which * * * courts are expected to * * * apply laws. But the framers and adopters of this amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They therefore embodied that spirit is a specific guaranty." He went on to say: "The guaranty was aimed at *undue favor* and individual or *class privilege*, on the one hand, and at hostile *discrimination*, on the other. It sought an equality of treatment of all persons even though all enjoyed the protection of due process. * * * Thus the guaranty was intended to secure equality of protection *not only for all but against all similarly situated.* Indeed, protection is not protection unless it does so. *Immunity granted to a class however limited, having the effect to deprive another class however limited of a personal or property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of right permitted worked against, a larger class.*" (Italics ours.) He concluded: "the equality clause * * * forbids the granting of equitable *relief to one man and denying of it to another under like circumstances and in the same territorial jurisdiction* * * * *It means that no person or class of persons shall be denied the same protection of the laws, which is enjoyed by other persons or other classes in the same place and under like circumstances.*" (Italics ours.)

In *Frost* v. *Corporation Commission* (1928), 278 U.S. 515, 522, this Court said: "The purpose of the clause in respect of equal protection of the laws *is to rest the rights of all persons upon the same rule under the same circumstances. Louisville Gas Co.* v. *Coleman*, 277 U.S. 32, 37."

(Italics ours.) As one state court has said: "The words seem so plain as to exclude the need of refinements in interpretation. Though prohibitory, they contain a necessary implication of a *positive right*—the right to an equality before every law, the right of the citizen *to be free in any State, from unjust discrimination between him and other persons, as to legal rights and duties.* Such is the plain meaning of the amendment. *Strauder* v. *West Virginia,* 100 U.S. 303." (Italics ours.) *State of Maine* v. *Cohen* (1935), 133 Me. 293, 300.

Petitioners' federal right to the equal protection of the laws has been violated by the State of Illinois. Immunity to liability in tort has been granted to a narrow class consisting of private charitable corporations *not presently endowed at the time of trial with liability insurance or other non-trust funds* (a) This "immunity from suit is a high attribute of sovereignty—a *prerogative* of the state itself" which creates *"a privileged class, free from liability for wrongs inflicted or injuries threatened"* for corporations "must be liable to the law, unless they are put above the law." (Italics ours.) (*Hopkins* v. *Clemson Agricultural College,* 221 U.S. 636), (b) the effect of which is to deprive another class consisting of persons who have been injured by the corporation *not presently endowed at the time of trial with liability insurance or other non-trust property* of their right to judgment on a verdict (personal security and property) in a situation in which all other private persons individual or corporate would be liable including charitable corporations presently possessed at the time of trial with liability insurance or other non-trust funds (*Moore* v. *Moyle,* 405 Ill. 555) and even private charitable corporations *not presently endowed with liability insurance or other non-trust property* which do not plead immunity (*Marabia* v. *Mary Thompson Hospital,* 309 Ill. 147), (c) and

make such corporation liable to judgment in tort only when it chooses to be so—for the holding of non-trust property, or the carrying of liability insurance (and the amount thereof), whether intentional or otherwise, are matters of voluntary action—thus in effect permitting the corporation to be a judge in its own cause (d) although such corporation could itself maintain an action in tort against a natural person by cross-complaint or otherwise and secure a judgment without restriction, and (e) the granting of relief against a master under the maxim *respondeat superior* in all other cases and the denial of that relief when the master is a private charitable corporation not presently endowed with liability insurance or other non-trust property at the time of trial is utterly unreasonable because the presence or absence of such assets is, as has been shown, an irrelevant and improper consideration and immunity deprives the injured person of his right to personal security and indemnity for its violation.

It follows that under the decisions of this Court and other courts that the State of Illinois in enforcing immunity under the circumstances of this case unjustly discriminates against persons injured by the torts of private charitable corporations not presently possessed of liability insurance or other non-trust property at the time of trial. Since, as has been shown immunity of charitable corporations was not recognized by the common law of England at the time this country was founded and was not part of the common law of Illinois or other state (or colony) at any time prior to July 28, 1868, it is not part of the old common law of the land, it cannot be tolerated on the ground it is due process of law. Consequently, when the immunity rule was enforced against petitioners in the instant case the State of Illinois denied petitioners their federal right to the equal protection of the law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. Counsel have shown:

(a) That there is a final judgment or decree;

(b) That the decision sought to be reviewed is by the highest court of the state in which decision could be had;

(c) That the case presents a substantial federal question;

(d) That the federal question sought to be reviewed was properly raised and preserved in the state courts; and

(e) That the decision of the highest court of the state does not rest upon a state ground which independently and adequately supports the judgment or decree.

It follows there is no jurisdictional impediment.

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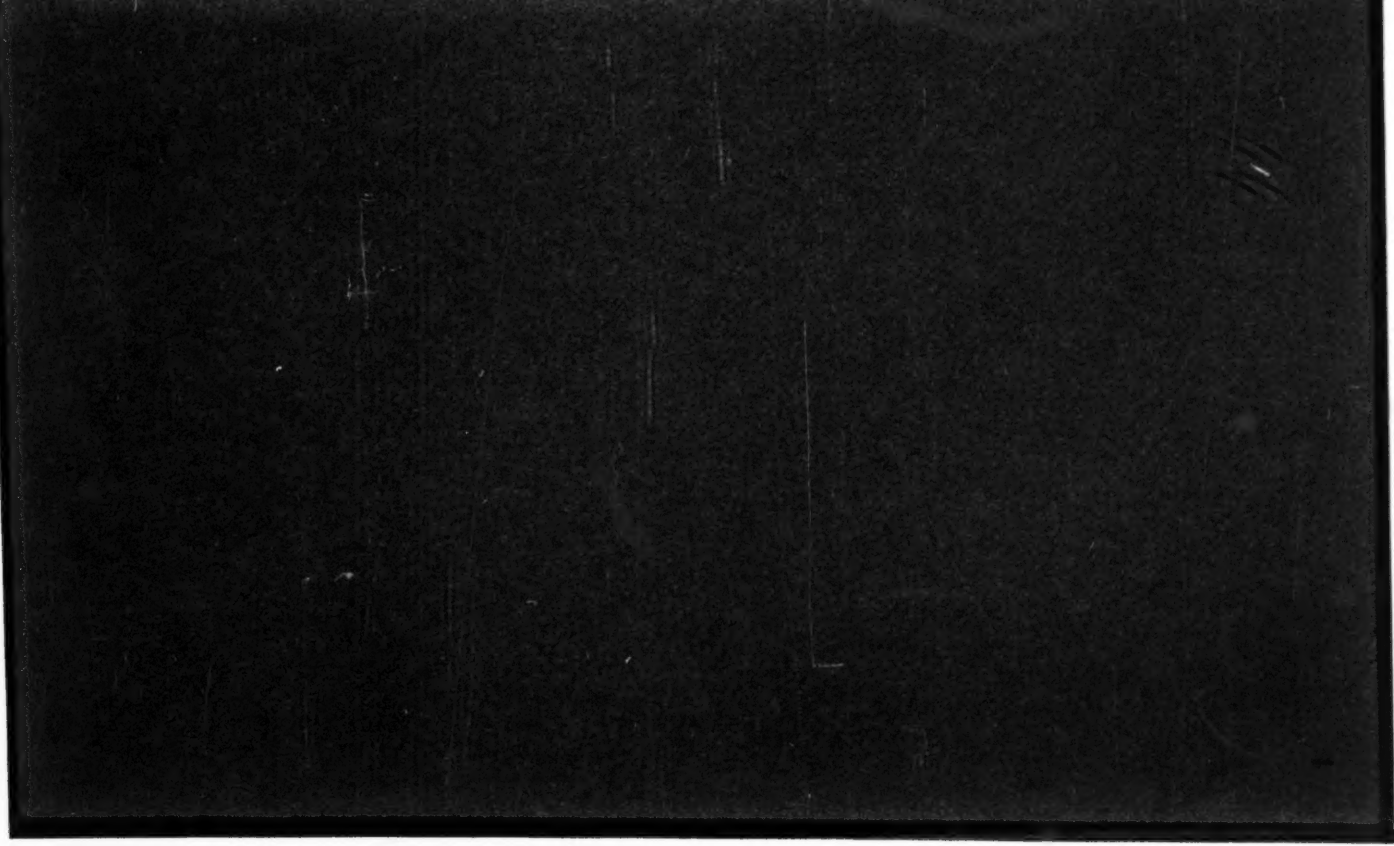

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1952.

No. 201

FRED SLENKER and ELIZABETH SLENKER,
Petitioners,

vs.

GRAND LODGE OF THE STATE OF ILLINOIS OF THE INDEPENDENT ORDER OF ODD FELLOWS,
Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS AND BRIEF IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Appellate Court of Illinois, Second District, is reported in *Slenker* v. *Gordon,* 344 Ill. App. 1.

The Supreme Court of Illinois denied Petition for Leave to Appeal on September 12, 1951 without opinion (R. 27).

The Supreme Court of Illinois dismissed the Writ of Error without opinion on January 16, 1952 (R. 38).

The Supreme Court of the State of Illinois denied Motion to Vacate Order Dismissing Writ of Error without opinion on March 11, 1952 (R. 83).

THE SUPREME COURT OF THE UNITED STATES LACKS JURISDICTION TO GRANT PETITION FOR WRIT OF CERTIORARI IN THIS CAUSE.

A. This Court is without jurisdiction to grant the writ under 28 U.S.C.A. 1257 (3) as invoked by the petitioners, for the reason that the constitutional rights now contended to have been violated were not set up or claimed in the state court at the proper time or in the proper manner. (See Statement p. 3 and Brief p. 7).

B. The judgment of the state court sought to be reviewed was rendered without opinion or assignment of reasons and can be amply sustained on non-federal grounds. (See Statement p. 3 and Brief p. 16.)

C. Even though the jurisdictional requisites were present, there has not been any showing that petitioners' constitutional rights have been violated by reason of the rule of the state court that the trust funds of a charitable organization are exempt from liability for the wrongful acts of its agents or servants. (See Brief p. 20)

STATEMENT OF THE CASE.

Respondent finds it necessary to make a corrected statement to supply facts not included in petitioners' statement, and to clarify the issues determined by the judgments of the State Courts.

Suit was filed to recover damages for personal injuries which petitioners alleged they sustained when their automobile, and one driven by David W. Gordon, collided on the public highway of Illinois. After certain motions were disposed of, and amendments made, the defendants remaining were Gordon, individually, and respondent. On the eve of the trial, the Court granted a severance of defendants and the trial proceeded against respondent alone (R. 129). The basis for liability claimed against respondent was that at the time of the collision, Gordon was acting as its agent or servant.

Respondent answered, denying liability generally; denied that Gordon was acting as its agent or servant at the time in question, and as an alternative, alleged it was organized pursuant to a special act of Illinois, and that its purposes and services were in furtherance of a public charity, and, being a charitable institution, it was exempt under Illinois law from liability for the negligent acts of its servants or agents.

Petitioners' reply to respondent's answer consisted of a denial that respondent's purposes and services rendered by it constituted a public charitable institution. In the pleading, and throughout the court proceedings on appeal, the petitioners contended respondent was a fraternal, benevolent organization.

At no time in the pleadings, during the trial, or in any of the proceedings on appeal, did petitioners raise the question that an adverse decision with respect to the charitable defense raised by the respondent would in any way infringe any right guaranteed by the Constitution.

During the trial before the jury, it was stipulated that the question of fact as to whether respondent was a public charitable institution should be withdrawn from the jury, and determined by the Court. (R. 31 and 284). At the close of all the evidence, the defendant moved for a directed verdict, asserting as grounds therefor that there was no evidence which tended to prove that Gordon, at the time of the collision, was acting as its agent or servant. The motion was overruled. Cross errors were assigned by respondent on appeal but the Appellate Court did not find it necessary to pass on the question raised by such motion.

After the verdicts were returned in favor of petitioners, respondent moved for a judgment notwithstanding the verdict, on the ground that the evidence showed it to be a public charitable organization and as such was exempt under Illinois law from liability for damages caused by the wrongful act of its agent or servants. The motion was allowed and judgment entered for respondent (R. 298).

No contention was made that the trial court's action in allowing the motion for judgment notwithstanding the verdict violated any of petitioners' constitutional rights (R. 31).

Petitioners appealed to the Appellate Court and on review the judgment was affirmed. Petitioners' request for a rehearing was allowed, and on reconsideration, the judgment was again affirmed. (Opinion of Appellate Court July 12, 1951.) (R. 34).

In accord, and within the time prescribed by the rules of the Court, petitioners petitioned the Supreme Court for

a leave to appeal from the judgment of the Appellate Court. Answers of respondent and briefs for respective parties were filed, and on September 12, 1951, the Court denied the petition (R. 27).

No claim was made in the Supreme Court by petitioners that judgment entered deprived them of their constitutional rights.

On October 11, 1951, petitioners filed an original action in the Supreme Court suing out a writ of error to review the judgment of the Appellate Court. The judgment and record sought to be reviewed in the writ of error action was the same judgment on which the Supreme Court had denied a petition for leave to appeal. The errors assigned in the writ of error action consisted of the errors assigned in the Appellate Court, and in addition, assignments were made in which petitioners attempted to claim that the entering of the judgment in the Appellate Court had violated their constitutional rights (R. 306).

Scire facias to hear errors issued out of the Supreme Court on request of petitioners and also served on respondent commanded it to appear in the next term of Court to be held the second Monday of January (January 14, 1952). Respondent was served more than twenty days prior to the opening day of the January term of the Supreme Court and appeared on January 14, and filed a motion to dismiss the writ of error action. Ten reasons were assigned in support of such motion, and affidavit and suggestions attached in support of the motion. Proof of service was made showing that the principal counsel for petitioners had been furnished with copies and exhibits so filed (R. 44).

On the 16th day of January, the Court allowed respondent's motion and no opinion was filed assigning reasons in support of the action taken. On February 1, petitioners

moved to vacate the order of January 16, and in support of the motion they set up that after the writ of error action had been docketed, petitioners applied to one of the Justices for an extension of time within which to file abstracts and briefs, and that pursuant to such application, time was extended for filing abstracts and briefs to February 13 (R. 44).

It was alleged that the Court's action dismissing the writ of error case before their briefs had been filed deprived them of constitutional rights. The motion to vacate was denied March 11, 1952 (R. 83).

On April 26, petitioners filed a further motion praying that they be granted leave to file in said writ of error action copies of their abstracts of record. Motion was denied but the abstracts of record have been included by stipulation in the record in this case and appear (R. 88, 308).

THE ARGUMENT.

A. This Court is without jurisdiction to grant the writ under 28 U.S.C.A. 1257 (3) as invoked by the petitioners, for the reason that the constitutional rights now contended to have been violated were not set up or claimed in the state court at the proper time or in the proper manner.

1. JURISDICTIONAL FEATURES.

Petitioners seek to invoke the jurisdiction of this court under the provisions of 1257 (3) 28 U.S.C.A.

Respondent contends they have not the burden cast on them of affirmatively showing the constitutional rights now claimed to have been violated were set up or claimed at the time or in the court necessary to confer jurisdiction.

Under state law, every final order and judgment may be reviewed by notice of appeal in either the Appellate or Supreme Court. Certain prescribed jurisdictional requisites direct the appeal to a particular court. In a case of this character, on the question under inquiry, the court to which the appeal may be taken depends on the presence or lack of debatable constitutional question which has been passed on by the trial court. If it is present the appeal is of right direct to the Supreme Court—otherwise it is to the Appellate Court. These jurisdictional requisites are of long standing and clearly and definitely mark the proper route to take in appealing a case from the trial court. However, there are no rights lost if a litigant appeals to the Supreme Court when no jurisdictional grounds are stated for that court transfers the entire record to the Appellate Court.

If an appeal be taken to the Appellate Court and a constitutional question appears in the record the appellant will be deemed to have waived the constitutional question and the court will determine the other questions preserved in the record.

The constitutional rights now claimed were not presented in the trial court and were not a factor in determining the court to which the appeal should be taken. The judgment of the Appellate Court and the order of the Supreme Court denying leave to appeal were made without any consideration of the Federal constitutional rights now urged.

Petitioners contend that under Sec. 11, Art VI of the State Constitution, Statutes and decisions, they had the right to have the constitutional questions determined in the writ of error action filed in the Supreme Court to review the judgment of the Appellate Court.

Respondent concedes such a right of review exists under state law, subject, however, that the right to the writ is restricted to those cases where the judgment of the Appellate Court raises for the first time a constitutional question. The application of the rules requires that all constitutional questions which appear or could properly be raised in the trial court must be submitted to that court, passed upon, and be subject to review by the statutory notice of appeal. If the constitutional question is of such nature the Supreme Court cannot assume jurisdiction by writ of error action.

The element of the time when the question arose is material to the jurisdiction of the Supreme Court to review by writ of error action.

Respondent's claim of immunity first arose when it pleaded that it was a charitable organization devoted solely to public acts of charity and that by reason thereof was ex-

empt from liability for the negligent acts of its agents and servants committed to the scope of their employment. The constitutional claim could have been presented in opposition to respondent's evidence of its charitable purposes. Respondent's motion for judgment notwithstanding the verdict was a direct challenge to the constitutional rights petitioners claimed in the writ of error action. It is urged that the petitioners' alleged constitutional right to have judgment on the verdict, arose in the trial court and should have been raised in that court. Failure to urge such question at that time constituted a waiver of the right to urge it. Had petitioners then claimed that the loss of the verdicts was an invasion of Federal constitutional rights, the question would have been preserved in the trial court record and subject to review by regular procedure following the method of appeal first described.

The requirement of state law that constitutional questions in the trial court may not be reserved by a party to be used after he has exhausted his right of review as the basis of a writ of error action to the requirement of 28 USCA 1257 (3) that the right claimed must be set up and claimed under the constitution. It has been held that such requirement of assertion of right demands that it be specially set up or claimed at the proper time and in the proper way. In *Mutual Life Ins. Co. of New York* v. *McGrew,* 188 U. S. 291; 23 S. Ct. 375; 47 L. Ed. 480 cited in the attached brief, it was said: "The proper time is in the trial court whenever that is required by the state practice, in accordance with which the highest court of a state will not revise the judgment of the court below on questions not therein raised."

It is submitted that this court is without jurisdiction.

AUTHORITIES IN SUPPORT OF ARGUMENT ON JURISDICTIONAL FEATURES.

On petition for certiorari the record should affirmatively show that the right relied upon was specially set up or claimed under the constitution at the proper time and in the proper way.

Memphis Natural Gas Co. v. *Beeler*, 315 U.S. 649; 86 L. Ed. 1095.

Mutual Life Ins. Co. of New York v. *McGrew*, 188 U.S. 291; 23 S. Ct. 375; 47 L. Ed. 480.

If the highest court of the State declined to consider the constitutional questions because not raised in accord with state practice, which is reasonable and well established, the United States Supreme Court is without jurisdiction to consider them.

Chicago I. & L. R. Co. v. *McGuire*, 196 U.S. 172; 49 L. Ed. 413.

Pennsylvania R. Co. v. *Illinois Brick Co.*, 297 U.S. 447; 56 S. Ct. 556; 80 L. Ed. 796.

Sec. 198, Chap. 110, Ill. Rev. Stat. of Ill. 1951 provides in part as follows:

> "Method of Appellate review. (1) Every order, determination, decision, judgment or decree, rendered in any civil proceeding, if reviewable by the Supreme or Appellate Court of this State by writ of error, appeal or otherwise, shall hereafter be subject to review by notice of appeal * * *." (After January, 1934).

Sec. 199, Chap. 110, Ill. Rev. Stat. of Ill. 1951 provides in part as follows:

> "Jurisdiction of Appellate and Supreme Courts. (1) Appeals shall be taken directly to the Supreme Court

in all cases in which a franchise or freehold or the validity of a statute or the validity of a county zoning ordinance or resolution or a construction of the constitution is involved * * * "

Section 32, Chapter 37 of Ill. Rev. Stat. 1951 provides in part as follows:

"The said Appellate Court created by this act shall exercise appellate jurisdiction only and have jurisdiction of all matters of appeal or writs of error from the final judgments, orders or decrees of any of the circuit courts or the superior court of Cook County, of county courts or from the city courts. * * * Appeals and writs of error shall lie from the final orders, judgments or decrees of the circuit and city courts and from the superior court of Cook County directly to the Supreme Court in all criminal cases and in cases involving a franchise or freehold or the validity of a statute."

It has been held by the State Supreme Court that Section 11, Article VI of the State Constitution confers a jurisdiction on it to review judgments of the Appellate Court under certain restrictions.

To give the Supreme Court jurisdiction to review a judgment of the Appellate Court upon writ of error, on the grounds a constitutional question is involved, such question must have arisen in the Appellate Court for the first time.

Bradford Supply Co. v. *Waite*, 392 Ill. 318.
Abrams v. *Awotin*, 388 Ill. 42.
Merlo v. *Public Service Co. of Northern Illinois*, 381 Ill. 300.

If a reviewable constitutional question appears *in the record of the trial court* but the aggrieved party appeals to the Appellate Court instead of to the Supreme Court, he will be deemed to have waived his constitutional claim for

the reason that he has taken the appeal to a court which has no power to review constitutional questions.

Hass Electric v. *Amusement Park Co.*, 236 Ill. 452.
Lukin v. *Lake Shore and Michigan S. Ry. Co.*, 248 Ill. 377.

2. The State of Illinois makes ample provisions for challenging the common law policy of this State on constitutional grounds but such challenge must be made at the first opportunity.

To explain the fact that the question now urged was not "specially set up or claimed" in the trial court, in the Appellate Court on appeal or on rehearing, nor in the Petition for Leave to Appeal in the Supreme Court, nor in the Petition to Reconsider Denial of Leave to Appeal in the Supreme Court, petitioners now advance the theory that there is no way of raising these particular questions in the court system of Illinois.

There are certain types of questions of which the Supreme Court alone has jurisdiction. These are: Cases involving a franchise, a freehold, the *validity* of a statute, or construction of the constitution. These cases must go directly to the Supreme Court by virtue of the provisions of Article VI, Section 11 of the Illinois Constitution and by virtue of the implementing statutes (Chap. 37, Section 32, Ill. Rev. Stat.) and Chapter 110, Section 199, Ill. Rev. Stat. It is therefore manifestly incorrect for petitioners to suggest that "the phrase within the meaning of the statute authorizing appeals direct to this Court adds nothing to the statement is not a constitutional question" (cited from *Moore* v. *Moyle*, 399 Ill. 230). It has much meaning and explains the procedural aspects of appeals in Illinois.

It has further become the rule that an appeal to the Appellate Court will constitute a waiver of these rights because, very soundly, since the Appellate Court has no jurisdiction over a matter exclusively left to the Supreme Court, the litigant must of necessity have waived his right. And the cited cases (*Hass Electric* v. *Amusement Park Co.*, 236 Ill. 452; *Luken* v. *Lake Shore and Michigan S. Ry. Co.*, 248 Ill. 377) stand only for the proposition that if the *validity* of a statute is involved, the constitutional question will be waived by an appeal to the Appellate Court.

In the present case there is no statute involved—but only a common law right and every Illinois lawyer knows that the appeal may be made to the Appellate Court. But it by no means follows that the point that petitioners' constitutional guarantees have been infringed could not be raised either in the trial court, nor decided by the Appellate Court. One such case involving the 14th Amendment was decided as late as June 4, 1952 by the Illinois Supreme Court.

Smith v. *Department of Registration and Education*, ... Ill. ..... 106 N.E. 722.

In the event there is any doubt as to whether the case is one over which the Supreme Court has exclusive jurisdiction, an appeal directly to the Supreme Court can be made in the interest of caution and the case will simply be transferred to the appropriate Appellate Court by virtue of Chapter 110, Ill. Rev. Stat. Section 210, which provides:

> "Where an appeal is taken either to the Supreme or Appellate Court and it is found or adjudged that the case was wrongly appealed to such court, it shall be the duty of such court to direct the clerk to transmit the transcript and all files therein with the order of transcript to the proper court. * * * "

It has already been pointed out that petitioner's lawyers were the attorneys in the case of *Moore* v. *Moyle*, 399 Ill.

230; also in *Moore* v. *Moyle,* 335 Ill. App. 342, and *Moore* v. *Moyle,* 405 Ill. 555. In those cases the precise question was involved as is involved here and arose in the following manner:

Suit was brought against Bradley University under a tort theory of liability. Bradley University moved to dismiss the action because it was a charitable corporation and *could not be sued* in an action of tort for negligence. The court granted the motion to dismiss. The plaintiff (represented by the same attorneys who are involved in this petition) moved to set aside the order dismissing the complaint on the ground that "the rule which holds that a charitable corporation is not liable in tort is a direct violation of the provision of the Constitution of the United States and the Constitution and laws of the State of Illinois." This motion was denied and plaintiff took an appeal to the Supreme Court of the State of Illinois. That court, in *Moore* v. *Moyle,* 399 Ill. 230, *simply* held that the provisions of Chapter 110, Section 199 of the Ill. Rev. Stat. providing for those types of cases upon which a direct appeal may be made to the Supreme Court did not apply, since the validity of a statute nor a debateable constitutional question were involved. It transferred the case to the *Second District* Appellate Court. The *Second District,* in *Moore* v. *Moyle,* 335 Ill. App. 342, was therefore called upon to decide the question as to whether or not the trial court in applying the common law policy granting immunity to a charitable corporation violated the provisions of the Constitution of the United States and the Constitution and laws of the State of Illinois. It had jurisdiction to make that decision because the Supreme Court had so directed it to decide the issue. It decided the case adversely to the plaintiff, clearly demonstrating that the petitioners here are in error in asserting that "the State of Illinois pro-

vides no means by which the common law policy of that State may be challenged or tested or governed by or subjected to the 14th Amendment." The decision of the Appellate Court was then appealed to the Supreme Court and that Court in *Moore* v. *Moyle,* 405 Ill. 555, decided that the Illinois rule granting immunity to charitable corporations for the torts of its servants and agents did not apply where there was liability insurance or where the pleadings in the trial court showed that there were non trust funds available for the payment of a judgment.

These series of cases in *Moore* v. *Moyle* demonstrate several things:

1. That the attorneys for present petitioner knew on July 15, 1946 when they filed their motion to set aside the trial court's order in *Moore* v. *Moyle* that the constitutional question had to be raised at that time (Incidentally, none of the attorneys representing petitioner here were representing the petitioner in the present cause until after the Supreme Court had dismissed the petition for leave to appeal, which probably explains why the constitutional question was not raised in the trial court in this case.)

2. That the State of Illinois does provide the machinery for the decision of whether or not the common law policy of the State of Illinois violates rights guaranteed to the plaintiff by the 14th amendment to the Constitution of the United States.

3. These cases demonstrate clearly that while the Supreme Court of Illinois has exclusive jurisdiction over certain types of cases, that it by no means follows that simply because the Supreme Court will not entertain jurisdiction on direct appeal that the litigant is thereby foreclosed from raising the question. The Supreme Court of Illinois is simply complying with the legislative mandate of this State

in refusing to entertain jurisdiction where the validity of a statute is not involved and it thereupon tranfers the cause to the Appellate Court where that court then must decide the issue presented.

It is submitted that the language of the Supreme Court in *Moore* v. *Moyle*, 399 Ill. 230, "where a judgment or decree is attacked on the grounds that its enforcement will deprive the one against whom it is sought to be enforced, of some constitutional right, no constitutional question is presented which authorizes a direct appeal to this court. The question involved in such a case is the validity of the judgment or decree and is not a constitutional question within the meaning of the statute which authorizes appeals direct to this court," amply demonstrates that it is the procedural statute about which the court is speaking and that the court is simply recognizing that "the validity of the judgment or decree" does not come within the meaning of the statute authorizing a direct appeal to the Supreme Court. The court's action in transferring the case to the Appellate Court shows that the Appellate Court does in fact have jurisdiction to decide constitutional questions identical with the one raised in the present case.

B. The judgment of the state court sought to be reviewed was rendered without opinion or assignment of reasons and can be amply sustained on non-federal grounds.

It has been pointed out that the jurisdiction of the State Supreme Court to review the judgment of the Appellate Court by writ of error action did not attach unless it appeared that the constitutional question arose for the first time in the Appellate Court. Since the constitutional question did not arise for the first time in the Appellate Court but was present and could have been presented in the trial court, there was no jurisdictional basis for the Supreme Court to retain the writ of error action. The order of

January 16 dismissing the cause can be sustained on the ground that the court was without jurisdiction and such grounds are non-federal.

In *Copperweld Steel Co.* v. *Industrial Commission,* 324 U. S. 780, 89 L. Ed. 1363, it was held that this Court would not assume jurisdiction in a certiorari proceeding to require the State Supreme Court to exercise a jurisdiction which it found had not been conferred upon it by the laws of the State.

Petitioners contend that the entry of the order of January 16th dismissing the writ of error action infringed upon their constitutional rights of due process for the reason that they had been granted an extension of time within which to file abstracts and briefs and that such extension had not expired when the cause was dismissed.

The writ of error action was filed, *scire facias* issued, and served on respondent commanding it to appear at the first day of the next January term (January 14). (It was docketed to the March term as is stated in the petition).

Rule 63 of the Supreme Court (Chap. 110 §259.63 Ill. Rev. Stat.) provides in substance that the first day of each term shall be the return day for the return of process and that no party shall be required to answer unless he has been served 20 days before the return day. As stated, respondent was served more than 20 days prior to the opening of said term and therefore was required to appear and file its pleading. Rule 61 of the State Supreme Court (Chap. 110 §259.61 Ill. Rev. Stat.) provides that the writs of error shall be directed to the Clerk of the Court in which the judgment complained of was entered and that such Clerk shall file a transcript of the record with the reviewing court. The record before us does not affirmatively show the transcript of record filed with the Supreme Court but it

does appear that the record of the Appellate Court was abstracted and became a part of this record by stipulation (R. 96-300).

Respondent's motion to dismiss the writ of error action contained among other grounds, the following:

(a) That they have waived all alleged constitutional questions by their failure to present them to the trial court.

(b) That the points urged for the first time in this case are not such constitutional questions as will confer jurisdiction on this court to entertain a writ of error action (R. 29).

It is clear that the jurisdiction of the Supreme Court of Illinois was challenged in the motion to dismiss. It is also clear that the constitutional question which petitioners relied upon to give the court jurisdiction in the writ of error action did not arise for the first time in the Appellate Court and without such showing the Supreme Court was without jurisdiction to retain the case and the motion to dismiss was allowed. It is not claimed by petitioners that their abstract of record or briefs which they had expected to file would in any way cure the jurisdictional defect as it then appeared on the records of the case. The assignment of errors filed in the writ of error action did not set forth facts showing that the jurisdictional requisite appeared in the record.

There is an additional non-federal ground on which the Supreme Court of the State of Illinois might well have dismissed the writ of error because of its lack of jurisdiction, that is, that petitioners having already exhausted every right of appeal granted to it by the Practice Act and Rules of the Supreme Court, were not entitled to an additional review by writ of error. The only cases which the Supreme

Court will review by writ of error, in addition to the right of review by petition for leave to appeal, are those cases which it is mandatory for it to consider by virtue of Section 11 of Article VI of the Constitution of the State of Illinois. The court very obviously considered that this was not the type of case which it must consider or otherwise it would of necessity have refused to dismiss the writ of error. Such a mandatory case was illustrated by the case of *Altchuler v. Altschuler*, 410 Ill. 169, cited by petitioners, but in that case the Appellate Court for the first time in the cause, despite the fact that there were no pleadings to support it nor any appeal from the trial court on the question, decided that a freehold was involved and under such finding, the Supreme Court took jurisdiction and determined the issues.

As has already been pointed out, unless the Appellate Court itself makes a decision for the first time in the case in that court involving one of the types of cases which the Supreme Court must decide by virtue of Section 11, Article VI of the Constitution of the State of Illinois, then the Court has no jurisdiction to consider the question by any other means than by petition for leave to appeal, which right in this case had already been exhausted.

We should also like to suggest that petitioner in the assignments of error in the writ of error proceeding took the position that the constitutional question did not arise in the trial court or in the Appellate Court, but arose only after the Supreme Court of Illinois had decided the case adversely to it. As we understand their Petition for Certiorari, that is still their position. In other words, there was no constitutional question in the case if they won the point—but only in the event the decision was adverse. We think this Court has already announced that there is no constitutional right to win a lawsuit.

But certainly this position had the effect of pleading the petitioner out of Court. The Supreme Court of Illinois has no jurisdiction to issue a writ of error to itself. It has no jurisdiction to issue a writ of error to the Appellate Court after 40 days have expired unless there is a mandatory constitutional question involved which arose in the Appellate Court for the first time.

It is respectfully submitted that the order sought to be reviewed can be sustained on non-federal grounds.

C. Even though the jurisdictional requisites were present, there has not been any showing that petitioners' constitutional rights have been violated by reason of the rule of the state court that the trust funds of a charitable organization are exempt from liability for the wrongful acts of its agents or servants.

As petitioner has conceded, there are some thirty-two of the forty-eight states which presently have a common law policy granting some type of immunity in an action in tort to charitable institutions. The number has been greater in the past and at one time practically every state granted some type of immunity. This was accomplished in a number of ways—usually under the Trust Fund theory —but also on the ground that since a charity in performing its function was performing duties of the State, that the charity was therefore entitled to the same immunity as the State. Regardless of the reasoning used, the fact remains that the great majority of the states still adhere to the rule as the Public Policy of that state.

Is it not strange that throughout the venerable history of this rule the petitioner has been unable to find a single case in which either a state or a Federal Court has held that the exemption accorded a charity violates the Federal Constitution. (The dictum in *Nicholson* v. *Good Sa-*

maritan Hospital, 145 Fla. 360, is the only case wherein a State Court has inferred that the rule violated the constitution of a state.)

The contention that a state must over-rule its common law rule which has stood for generation after generation without attack or else the petitioner is deprived of constitutional rights is unthinkable and certainly overlooks the fact that this Court has repeatedly held that the State may alter or retire common law policy without violating the Constitution even if it means that a remedy has been altered or destroyed.

In the vast number of compensation cases which have reached the Supreme Court of the United States, this Court has consistently held:

(a) That the defense of contributory negligence may be abolished.

(b) That the fellow servant rule may be abolished.

(c) That the employee's right at common law (wherein extremely large verdicts were involved) may be abolished, and an entirely different remedy (though inadequate) substituted.

Jeffrey Mfg. Co. v. *Blagg,* 235 U. S. 571, 35 S. Ct. 167, 59 L. Ed. 364.

Arizona Employers Liability Cases, 250 U. S. 400, 39 S. Ct. 553, 63 L. Ed. 1053.

This Court, and state courts, have consistently held that it was within the province of the State to remove the liability of the driver of an automobile to his guest as the result of simple negligence—thereby, of course, approximately the present immunity.

Silver v. *Silver,* 50 S. Ct. 57, 281 U. S. 117, 74 L. Ed. 221.

Naudzius v. *Lahr,* 253 Mich. 216, 234 N. W. 581.

There has never been any question that it was within the power of the State to impose liability upon the owner of a car for the negligence of the driver even though there was no agency. Can it be doubted that the same liability could be removed?

Oneill v. *Williams*, 71 Cal. App. 668, 15 Pac. (2d) 879.

This Court has held that the Federal government and the States may pass on their immunity to those corporations performing the services of the state.

Keifer and Keifer v. *Reconstruction Finance Corp.*, 306 U. S. 381, 83 L. Ed. 784.

If the rule contended for the petitioner is to be adopted by this Court, it must surely follow that the various states will no longer have the power to make any determinations of public policy that certain types of property should be exempted from liability. It is submitted that it would necessarily follow that every state must alter its rules with respect to:

1. The homestead exemption.
2. The garnishment exemption.
3. The rules upholding spendthrift trusts.
4. The bankruptcy rules permitting certain exemptions.
5. The laws forbidding execution against certain household goods and tools of trade.
6. The state laws exempting municipal corporations and states from liability of the torts of its agents and employees.

Surely no one can contend that a state does not have the authority to say that it is to the best interests of the state and that Public Policy demands that certain types of prop-

erty should be exempt from liability—and that in so doing the Constitution of the United States is not infringed. And that is all that is involved here. The petitioner has conceded the correctness of the Trial Court's decision that this was a public charity. It had to do this because the proof conclusively showed that its entire funds were devoted to the maintenance of two institutions—an Old Folk's Home and an Orphans' Home.

It cannot be successfully argued that Federal constitutional rights prohibits the State of Illinois from holding that the funds of a charitable corporation may be exempted from liability.

CONCLUSION.

For the foregoing reasons, the Petition for Writ of Error should be denied.

All of which is respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951

No. 201

FRED SLENKER and ELIZABETH SLENKER,
Petitioners,

vs.

GRAND LODGE OF THE STATE OF ILLINOIS OF THE INDEPENDENT ORDER OF ODD FELLOWS,
Respondent.

REPLY TO ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners have carefully examined the Answer to their Petition and have noted a basic misunderstanding of the issues by respondent. At pages 2, 17, and 20 to 23 of the Answer respondent states that the rule petitioners state to be the rule that violates their constitutional rights is the "rule of the state court that the trusts funds of a charitable organization are exempt from liability for the wrongful acts of its agents or servants." It probably does. But

the rule here objected to is rather the rule of the state court that a charitable corporation is not liable to judgment in an action brought against it by a stranger when it is not presently possessed of non-trust property at the time of trial.

It is true as stated at page 5 of the Answer that respondent was required as defendant-in-error to appear before the Supreme Court of Illinois on January 14, 1952, but it is not true that it was required to file a motion to dismiss the writ of error at that time or that the Supreme Court of Illinois had a right to entertain the motion and to dismiss the writ of error at that time.

It is also true as stated at page 6 of the Answer that petitioners as plaintiffs-in-error filed a motion alleging "that the Court's action dismissing the writ of error case before their briefs had been filed deprived them of constitutional rights" but that was by no means the sole ground on which it was alleged that their constitutional rights had been denied by the action of the Supreme Court of Illinois in doing so. See Motion To Vacate Order Of Dismissal (Rec. 39) and the Supplemental Motion To Vacate (Rec. 81). See Petition pp. 4-8, and 13 (Q. No. 6).

Reply to Respondent's Argument A-1.

At pages 8-9 of its Answer respondent states:

> "Respondent's claim of immunity first arose when it pleaded that it was a charitable organization devoted solely to public acts of charity and that by reason thereof was exempt from liability for the negligent acts of its agents and servants committed to [*sic*] the scope of their employment."

That is true.

Respondent continues:

> "The constitutional claim could have been presented in opposition to respondent's evidence of its charitable purposes."

That is theoretically true.

Respondent contends:

> "Respondent's motion for judgment notwithstanding the verdict was a direct challenge to the constitutional rights petitioners claimed in the writ of error action."

That is true.

Respondent argues:

> "It is urged that the petitioners' alleged constitutional right to have judgment on the verdict, arose in the trial court and should have been raised in that court."

That is what counsel for appellant argued in *Moore* v. *Moyle*, 399 Ill. 230. The Supreme Court of Illinois held that no constitutional question arose in the trial court.

Respondent states:

> "Failure to urge such question at that time constituted a waiver of the right to urge it."

But how could there be a waiver if, as the Supreme Court of Illinois held in *Moore* v. *Moyle*, 399 Ill. 230, no constitutional question could arise in the trial court when a motion raising such questions is denied by the trial court? (See Motion at pp. 28 to 32 of Abstract filed in *Moore* v. *Moyle* which accompanies this Reply.)

Respondent claims:

> "Had petitioners then claimed that the loss of the verdicts was an invasion of Federal constitutional rights, the question would have been preserved in the trial court record and subject to review by regular procedure following the method of appeal first described."

The *Moore* v. *Moyle* cases, 399 Ill. 230; 335 Ill. App. 342; and 405 Ill. 555, belie any such contention. That procedure is a blind alley.

Counsel agree with the decision of this Court in *Mutual Life Ins. Co. of New York* v. *McGrew*, 188 U.S. 291, that a constitutional question must be raised in the trial court when "that is required by the state practice." But we most vehemently assert that it cannot be said to be the practice in the State of Illinois when it would be perfectly fruitless to raise the constitutional question in the trial court as shown by the *Moore* v. *Moyle* cases. For the Supreme Court of Illinois distinctly held in *Moore* v. *Moyle*, 399 Ill. 230 and 405 Ill. 555, that no constitutional question arose in the trial court although the immunity rule was specifically attacked on constitutional grounds in the trial court. See Abstract in *Moore* v. *Moyle*, pp. 29-30. Is it conceivable that a state will or may require a litigant to do a useless thing in the trial court in order to preserve a constitutional question for review?

At page 11, under Authorities In Support Of Argument On Jurisdictional Features, respondent states in its Answer:

> "If a reviewable question *appears in the record of the trial court* but the aggrieved party appeals to the Appellate Court instead of the Supreme Court, he will be deemed to have waived his constitutional claim for the reason that he has taken the appeal to a court which has no power to review constitutional questions." (Italics theirs.)

Petitioners agree that the Appellate Court has no power to decide such questions. They disagree with the balance of the statement as it stands. It would be a correct statement of law if it was qualified by the words "provided it raises a question which the Supreme Court of Illinois will consider on direct appeal." The questions here presented and

presented to the Supreme Court of Illinois on writ of error are questions which the Supreme Court of Illinois has held do not give rise to a constitutional question authorizing a direct appeal even though presented to and passed on by the trial court. *Moore* v. *Moyle*, 399 Ill. 230; 335 Ill. App. 342; 405 Ill. 555. How could there be any waiver where it would be perfectly useless to present the question purportedly waived to the trial court for decision, the Supreme Court would not review the case on direct appeal, and the Appellate Court has no jurisdiction to determine the issue?

Reply to Respondent's Argument A-2.

At page 12 counsel for respondent have categorically stated that Illinois makes ample provisions for challenging the common law policy of the State on constitutional grounds. After carefully reading the section of respondent's Answer above referred to devoted to developing that thesis petitioners' attorneys are left without chart or compass to arrive at the destination suggested by our opponents. It is characteristic of their argument that counsel for respondent seem to have corralled several horses and galloped off madly in various directions. On page 13 of the Answer they say the Appellate Court has no jurisdiction of constitutional questions. On page 14 of their answer they say that in the case of *Moore* v. *Moyle*, 335 Ill. App. 342, the Appellate Court of Illinois had jurisdiction over the constitutional issues two of present counsel for petitioners had attempted to present to the Supreme Court of Illinois, because they say the Supreme Court had directed it to decide those issues. Knowing that a party has a right to have a constitutional issue decided by some appellate court, respondent, not being able to discover a court with the requisite jurisdiction to determine the constitutional questions raised when the common law policy of the state is attacked on constitutional grounds, has decided to fix

jurisdiction in the very Appellate Court it elsewhere acknowledged has no such jurisdiction. Even a casual glance at the Supreme Court opinion in *Moore* v. *Moyle*, 399 Ill. 230, discloses that no such direction was given. Even a less than casual glance at the opinion in *Moore* v. *Moyle*, 335 Ill. App. 342, discloses that the Appellate Court decided no such issues. It did not purport to do so, the reference to constitutional questions being merely an aside remark commenting on the number of pages in the briefs which had been prepared for and submitted to and used by the Supreme Court of Illinois in determining the direct appeal in *Moore* v. *Moyle*, 399 Ill. 230, and which were bodily transferred to the Appellate Court when the cause was transferred to the Appellate Court, no new briefs being filed, the entire record as respondent notes at page 7 of its Answer being transferred to the Appellate Court. Rule 47 of the Supreme Court of Illinois provides that:

> "upon an order for transference being made all documents already filed in the wrong court shall be transmitted by the clerk to the proper court, and the case shall proceed from that point in all respects as though the appeal had originally been taken to the proper court." (Ill. Rev. Stat. Ch. 110, Sec. 210.)

In the second appeal to the Supreme Court in *Moore* v. *Moyle*, 405 Ill. 555, the Supreme Court said it (not the Appellate Court) had decided the constitutional issues. The Supreme Court of Illinois has held that the Appellate Court has no jurisdiction to decide a case on constitutional grounds and when it does so its decision is a nullity. In *People* v. *Kingery*, 368 Ill. 205, for example, the trial court in a mandamus proceeding held that the defendant was under a duty to institute a proceeding under the Eminent Domain Act for the purpose of determining what damages were suffered by the petitioner by reason of a change in grade in a highway "under the statutes and Constitution of

this State." The Appellate Court reversed the judgment solely on constitutional grounds, i.e., its own construction of the Constitution. The Supreme Court of Illinois said:

> "It is clear that a constitutional question is necessarily involved in this case * * * the Appellate Court * * * based its opinion on its construction of the Constitution. This it was *without* jurisdiction to do. The only power that court had in the premises was to transfer the cause to this court, and any other order entered by it in this cause is *coram non judice* and *ineffectual for any purpose. Schmidt* v. *Barr*, 328 Ill. 365; *Kowalczyk* v. *Swift & Co.*, 317 Ill. 312. * * * The judgment of the Appellate Court, being *void*, is vacated, the order of submission is set aside, and the cause will be treated as transferred to this court for decision of all the issues." (Italics ours.)

And the Illinois Appellate Courts have always held they have no jurisdiction to decide constitutional questions even when the case comes to them by transfer from the Supreme Court of Illinois. *Prudential Insurance Co.* v. *Richman*, 292 Ill. App. 261. Obviously, the Appellate Court decided no constitutional question in *Moore* v. *Moyle*, 335 Ill. App. 342.

The series of cases in *Moore* v. *Moyle*, 399 Ill. 230, 335 Ill. App. 342, and 405 Ill. 555, establishes only that counsel for present petitioners when they were involved in that case believed that the constitutional question should have been raised in the trial court. Their minds were quickly disabused of this belief by the Supreme Court of Illinois which held that the question was not one of constitutionality of a common law rule but whether the decision was right or wrong. Respondent attempts at pages 13 and 16 of its Answer to justify the Supreme Court in its refusal in *Moore* v. *Moyle*, to review that case on direct appeal on the ground that by statute it had no jurisdiction unless the validity of a statute is involved overlooks the fact that

the Supreme Court of Illinois under the same statute as that governing appeals where the validity of a statute is involved (Sec. 199, Ch. 110, Ill. Rev. Stat.) has jurisdiction on direct appeal where the construction of the Constitution is involved and the construction of the Constitution is involved when a claim is advanced that a statute or common law rule is invalid because of it. But whether the decision of the Supreme Court of Illinois in *Moore* v. *Moyle*, 399 Ill. 230, was right or wrong is not important. The important thing is that the Supreme Court of Illinois in deciding that case as it did, established in Illinois a system whereby the common law policy of that state cannot be challenged or tested or governed by or subjected to the 14th Amendment, i.e., provides no way in which a common law rule may be attacked on the ground it is unconstitutional.

At page 13 of its Answer respondent contends that the Supreme Court of Illinois will review a case on direct appeal when a party claims he has been deprived of common law rights in violation of the Constitution and raises the point in the trial court. It cites *Smith* v. *Department of Registration*, 106 N.E. 2d 722. In that case the Department by administrative action revoked a license of a doctor to practice medicine on the basis of information possessed by members of the medical committee but not disclosed in the record. Counsel for petitioners are aware of that line of cases. *People* v. *Harrison*, 403 Ill. 320, in which one of the attorneys for petitioners was of counsel for the plaintiffs-in-error, is a good example. The case involved an indirect contempt. The Supreme Court took jurisdiction on direct appeal on the ground a constitutional question was involved because:

> "Under the decisions of this court, we are of the opinion the alleged contempt was indirect and not punishable summarily as in the case of a direct contempt. This being so, plaintiffs-in-error were entitled to be

> heard on a formal charge. * * * to have the information, petition or affidavit positively verified by an affidavit. This right was not accorded plaintiffs-in-error in the present case for the charge against them consisted only of an unverified petition filed by the State's Attorney. * * * On the record before us, and in view of our finding that the alleged contempt was indirect contempt, the summary method by which the trial court sought to punish plaintiffs-in-error denied them due process of law. Its judgments are void and are reversed."

In other words failure to comply with accepted common law procedure deprives the person against whom judgment is rendered of his life, liberty or property as the case may be, without due process of law. The contention that it does so is a constitutional question, i.e., involves a construction of the Constitution, which gives the Supreme Court of Illinois jurisdiction on direct appeal. The Appellate Court has no jurisdiction to determine that it deprives the person of his life, liberty or property without due process of law.

These cases are not authority for the proposition that the Supreme Court of Illinois has or will take jurisdiction of a case on the ground that a constitutional issue is involved when an accepted procedural or substantive common law rule, i.e., judge made law, a rule established by judicial decision, is itself attacked on the ground it deprives a person of his life, liberty or property without due process of law and denies to him the equal protection of the law.

We have conclusively shown (Petition pp. 25-32) without indulgence in flights of fancy that Illinois does not provide any method by which the common law policy of that State may be tested against the 14th Amendment to the Constitution of the United States. Only after the Supreme Court of that State has, as in this case, ended all hope of judicial correction in the state system of errors made by inferior courts that a constitutional question can be said to arise. Counsel are not required to joust with windmills by raising

a constitutional issue earlier when no review can be had of the constitutional question and any such question would be waived by appeal to the Appellate Court.

Reply to Respondent's Argument B.

Respondent claims that the action of the Supreme Court of Illinois in dismissing the writ of error can be sustained on non-federal grounds. The first ground advanced at page 16 of the Answer is that the constitutional question "was present and could have been presented in the trial court." This argument is advanced by counsel for respondent, one of whom, Loren E. Murphy of Monmouth, Illinois, as a member of the Supreme Court of Illinois wrote the opinion in *Moore* v. *Moyle*, 399 Ill. 24, holding that a motion filed in the trial court to set aside an order dismissing a complaint on the ground that the rule granting immunity to judgment to a charitable corporation was unconstitutional on specific grounds enumerated in the motion including the grounds advanced in the Petition For Writ Of Certiorari in this case did not raise a constitutional question. Let us test respondent's contention. Let us suppose that petitioners had followed the procedure followed in *Moore* v. *Moyle* and had filed a motion to set aside the order entering judgment for defendant notwithstanding the verdict on the ground that the rule of limited immunity to judgment was unconstitutional in the trial court in due time. What would have happened? It is submitted that regardless of the decision renderd by the trial court on the hypothetical motion to set aside the judgment for defendant the action would be fruitless because: 1. The motion would not raise a constitutional question (*Moore* v. *Moyle*, 399 Ill. 230); 2. Direct appeal by the losing party would not lie to the Supreme Court of Illinois (*Moore* v. *Moyle*, 399 Ill. 230); 3. If direct appeal were undertaken the cause would be

transferred to the Appellate Court (*Moore* v. *Moyle*, 399 Ill. 230); 4. If appeal were taken to the Appellate Court and no issues other than constitutional issues were raised to be determined the Appellate Court would have no jurisdiction to decide the case and would be required to transfer the cause to the Supreme Court and any decision the Appellate Court might render would be vacated by the Supreme Court (*People* v. *Kingery*, 368 Ill. 230); 4. If appeal were taken to the Appellate Court and issues other than constitutional issues were raised to be decided in addition to the constitutional questions, the constitutional questions would be waived (*Hass Electric* v. *Amusement Park Co.*, 236 Ill. 452; *Luken* v. *Lake Shore and Michigan S. Ry. Co.*, 248 Ill. 377); 6. (Returning to 3.) Following transfer to the Appellate Court, the Appellate Court would have no jurisdiction to decide the constitutional questions (*Prudential* v. *Richman*, 292 Ill. App. 261); 7. After direct appeal to the Supreme Court of Illinois and transfer to the Appellate Court should further appeal be granted by certificate of importance issued by the Appellate Court or leave to appeal granted by the Supreme Court the Supreme Court of Illinois would hold that it had decided there were no constitutional questions presented (*Moore* v. *Moyle*, 405 Ill. 555); 8. After direct appeal to the Supreme Court of Illinois and transfer to the Appellate Court should further appeal be denied and review by writ of error sought the Supreme Court would dismiss the writ of error on the same ground, i.e., that it had decided the constitutional question on direct appeal (*Moore* v. *Moyle*, 405 Ill. 555).

Obviously, it would have been absolutely futile in this case for petitioners to raise a constitutional issue in the trial court under established Illinois procedure. Counsel traveled that road in *Moore* v. *Moyle* and know the result from actual experience. Now when a litigant takes

a common sense view of the situation and advances no constitutional question in the trial or Appellate Court but defers suing out a writ of error on constitutional grounds until all possibility of review by appeal has been extinguished without fault on the part of the litigant we find that counsel for respondent including a lawyer who as judge wrote the opinion making the course suggested by them absolutely futile insist that the constitutional questions were waived because the litigant pursued the only alternative course open to him in the state judicial system rather than the futile procedure. And the Supreme Court of Illinois listens to them and dismisses the writ of error on motion without opinion and refuses to write an opinion (Rec. . .) when requested to do so (Rec. . .). Petitioners repeat: *The State of Illinois provides no means by which the common law policy of that state may be challenged or tested or governed by or subjected to the 14th Amendment.*

Respondent cites *Copperwald Steel Co.* v. *Industrial Commission*, 324 U.S. 780, in support of the proposition that the Supreme Court of the United States would not assume jurisdiction in a certiorari proceeding to require the State Supreme Court to exercise a jurisdiction which it [the State Court] found had not been conferred upon it by the laws of the State. That case stands for no such proposition. This court held that "we have no jurisdiction on appeal": "we have jurisdiction to review the decision on certiorari (28 U.S.C. 344 c)": "Inasmuch as we conclude that decision [of the State Supreme Court] was grounded upon the view that the appellant *had not pursued the remedy afforded by state law* for the vindication of any constitutional right it claimed was violated, we must dismiss the appeal and deny certiorari." (Italics ours.)

The court merely decided that the state *provided* a remedy and that the remedy *provided* had not been resorted to.

This Court decides for itself whether the state provides a remedy. If the remedy is provided then this Court will not grant certiorari when the party seeking review has not pursued it. There is no remedy here. Since it is not provided certiorari should be granted.

At page 17 of its Answer respondent seeks to limit petitioners' claim that their constitutional rights were violated by the action of the Supreme Court of Illinois dismissing their writ of error to the fact that such extension had not expired when it was dismissed. Our claim is not so limited. (See Petition, pp. 5-8.)

Rule 63 of the Supreme Court of Illinois required respondent to appear on the first day of the term as stated by respondent at page 17 of its Answer: it did not require it to file a pleading at that time, and if the rule did so require it did not require the court to pass on the motion at that time.

A device often adopted by astute appellate counsel is to give an unanswerable argument of his opponent the silent treatment in the hope that it will escape the notice of the court. It has been applied here by counsel for respondent who make no reference to the three rules of its own which the Supreme Court of Illinois violated in granting the motion to dismiss the writ of error (Pet. pp. 4-8). To refuse to apply rules of court to every litigant without discrimination is of itself to deny due process to the litigant discriminated against.

Respondent's motion to dismiss the writ of error, as stated in its Answer at page 18, alleged waiver of constitutional questions in the trial court by failure to assert them there—but there could be no waiver because under the decisions of the Supreme Court of Illinois none arose in the trial court. Its motion also alleged that the questions raised were not *such* constitutional questions as would confer juris-

diction on the Supreme Court of Illinois on writ of error. Now just precisely what sort of a constitutional question will confer such jurisdiction? And while we are about it just what kind of constitutional question does a party have to raise to get review by the Supreme Court of Illinois? Respondent's theory might well be named the doctrine of State Judicial Nullification Of The Federal Constitution for under it a constitutional question could not be determined in the Illinois judicial system unless the Illinois Appellate Court or the Illinois Supreme Court in the exercise of its discretion choose to grant further review which they declined to do in the instant case. How can the common law policy of the State be challenged or tested or governed by or subjected to the 14th Amendment under such circumstances?

The additional non-Federal ground which counsel for respondent have conjured up and which appears at page 18 of the Answer is the theory that the Supreme Court of Illinois believed that this was not one of those cases which it is required to entertain by the provisions of the Constitution of Illinois and petitioners' statutory right of review having been exhausted the Supreme Court of Illinois had no jurisdiction to review the case on writ of error. Petitioners anticipating such an argument showed it was untenable at pages 9 and 10 of their Petition. Respondent's attorneys, therefore, invent a man of straw to eliminate. They subtly suggest at page 19 of their Petition that it is petitioners' position that the constitutional question did not arise in the Appellate Court, but only arose after the Supreme Court decided the case against petitioners. What counsel for respondent overlook is the fact that the Supreme Court of Illinois has never decided the case. It has simply refused to decide it at all and has left standing the Appellate Court judgment which deprived petitioners of their rights under the 14th Amendment of the Constitution of the

United States, but which did not become the conclusive action of the State of Illinois until all power to correct the injustice was ended by extinction of all possibility of further review by appeal in the state judicial system. If the illustory proposition as stated by opposing counsel serves to illustrate anything it points up the validity of our complaint that the litigant seeking to test the constitutionality of a common law rule in Illinois is faced with entombment in a labyrinth, just as this Court has previously found was the result of the criminal procedure of that state.

Reply to Respondent's Argument C.

At page 20 of its Answer respondent states that "the fact remains that the great majority of the states" still adhere to immunity as a matter of public policy. The statement is false. A casual examination of pages 36 and 37 of the Petition and the cases fully discussed in the motion presented to the Supreme Court of Illinois to vacate the order dismissing the writ of error appearing at pages 56 to 59 and pages 47 and 48 of the Record, refute any such contention. All but about eight states would allow petitioners to recover a judgment in this case.

Respondent claims that the so-called rule of non-liability of charitable corporations in tort is an old one. That contention is refuted by the authorities cited at pages 32 to 37 of the Petition and discussed in the motion to vacate the order of dismissal appearing at pages 52 to 57 of the Record. Where immunity does exist it exists by virtue of judicial decisions promulgated after the adoption of the 14th Amendment, i.e., July 28, 1868. In Illinois it dates from 1905. Many states had no decisions on the subject of tort liability of charitable corporations until recent years and immunity has been overthrown or rejected in the vast majority of states passing on the subject since 1940. The

rule has been under constant attack in every jurisdiction in which it has been retained. The reasons given to support immunity are varied but have one element in common—none are based on common sense.

It is true, as opposing counsel state in the last paragraph on page 20 of the Answer, that there is a lack of decision holding that this particular immunity where conferred is unconstitutional. For the most part this is attributable to the fact that the number of jurisdictions which permit the survival of this erroneous doctrine is rapidly diminishing, practically all the more recent decisions having found that the common law permits no such immunity, and it was unnecessary to argue constitutionality. In part it is doubtless attributable to the fact that the constitutional issues have not been adequately considered by litigants. These reasons do not preclude the raising of constitutional issues in this case. As in *Erie R.R.* v. *Tompkins*, 304 U.S. 64, the constitutional issues although inherent in the situation created by the immunity rule have not been raised. And in that case this Court raised the constitutional questions and not the litigants.

While a state may alter or retire a common law policy under certain conditions without violating the Constitution it does not follow that it can destroy remedies willy nilly. Compensation legislation substituted remedies for remedies taken away, broadened the scope of liability, and insured recovery. Such legislation created no immunity to liability or exemption of assets from being taken to satisfy that liability. Compensation legislation only affects those voluntarily entering into the contractual relationship of employer-employee and the rights given and taken away are incident to the status thus created. Removal of liability to a guest is likewise based on a status voluntarily entered into between the parties legal results arising from that status

being known to those entering into the status. Liability may be imposed on the owner of a car as part of the responsibility of ownership of a car and the legal results are known to those who purchase automobiles.

At page 22 of the Answer it is asserted that this Court decided "that the Federal government and the States may pass on their immunity to those corporations performing the services of the state." You did nothing of the kind. *Keifer and Keifer* v. *Reconstruction Finance Corp.*, 306 U.S. 381, is authority for no such proposition. This Court merely held that when a government wanted to clothe a *public* corporation with immunity it knew how to do it, and in the absence of an express legislative declaration granting such immunity it could not be extended to it by the courts.

This Court said:

> "the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work."

If true of public corporations how much more is it true of private charities? In Illinois the courts advance no such contention. As the court said in *Moore* v. *Moyle*, 405 Ill. 555:

> "An examination of the *Parks* case [218 Ill. 381] reveals that the sole object of the doctrine there announced was to protect the trust funds of charities from depletion through the tortious conduct of their employees and agents."

The *Keifer and Keifer* v. *Reconstruction Finance Corp.* case inevitably leads to liability when followed to its logical conclusion when the principle stated therein is applied to a private corporation such as respondent where as in this case no legislative declaration is made in the statute creating such corporation that it is endowed with immunity to judgment in an action in tort. And in our opinion any

statute attempting to clothe a private person individual or corporate with such immunity would be unconstitutional.

At page 22 of its Answer respondent refers to certain exemptions. Exemption is not immunity. No one is immune from liability to judgment by the exemptions enumerated. Municipal immunity is founded in the common law, was part of the common law of Illinois prior to July 28, 1868, and relates only to public corporations. And municipal corporations are liable in tort when not acting in a governmental capacity.

Particularly inappropriate for respondent's position is the citation of the spendthrift trust immunity as one of those rules which respondent contends the states would be compelled to alter if petitioners' contention in the instant case were to be sustained. No jurisdiction where the spendthrift trust device is permitted (there are many where it is not) has ever held that by it the beneficiary of the spendthrift trust is immune from judgment. The most that has been done is to preclude resort to a particular fund for the judgment's satisfaction. Here the Illinois Appellate Court has not been satisfied to keep trust funds from being seized to satisfy a judgment—it has held that the recovery of judgment itself is dependent upon a present existing source for the payment of the judgment.

In response to respondent's argument at page 23 of the Answer, counsel concede that the defendant was held to be a [redacted] charity by the decision of the Appellate Court and for purposes of review by this court we accept that as the law of the state. We do not concede the correctness of that decision but doubt the authority of this court to do anything about it. Under our view of the case the determination is immaterial.

The exemption of trust funds is not involved in this case; the question is immunity from *judgment*. In passing, how-

ever, the defendant has so-called trust funds set aside for the purpose of paying administrative expenses (which can be raised by capitation tax) and we doubt that under such circumstances the courts can grant the trust assets of the corporation exemption from being taken to satisfy the judgment to which petitioners are entitled.

Counsel for respondent have employed the well-recognized "scare" technique to persuade this Court of dire results to follow if this Court grants certiorari and sustains petitioners' position. Obviously, no such frightening prospect exists. Not only is the position of the Illinois courts in this case invalid under the Constitution of the United States but it is patently unjust and immoral.

Certiorari, petitioners urge, should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1952

No. 201

FRED SLENKER and ELIZABETH SLENKER,
Petitioners,

vs.

GRAND LODGE OF THE STATE OF ILLINOIS OF THE INDEPENDENT ORDER OF ODD FELLOWS,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

HUGH M. MATCHETT,
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HUBERT L. WILL,
Chicago, Ill.

Dated: Chicago, Ill., October 27, 1952.

BARNARD & MILLER, 33 N. Market St., Chicago 6. FR anklin 2-0363

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1952

No. 201

FRED SLENKER and ELIZABETH SLENKER,
Petitioners,

vs.

GRAND LODGE OF THE STATE OF ILLINOIS OF THE INDEPENDENT ORDER OF ODD FELLOWS,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, Fred Slenker and Elizabeth Slender, respectfully pray that the Court grant a rehearing of the order entered October 13th, 1952, denying their petition for writ of certiorari to review a final order of the Supreme Court of the State of Illinois (Rec. 83) refusing to set aside an order of that court dismissing a writ of error (Rec. 38) which petitioners had sued out to review a deci-

sion (Rec. 6) of the Appellate Court of Illinois, Second District, on federal and state constitutional grounds (Rec. 300).

This petition for rehearing is filed pursuant to Rule 33.2 of this Court based on other substantial grounds available to petitioner although not previously presented. Counsel certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds herein specified.

JURISDICTION

The Supreme Court of Illinois dismissed the writ of error on January 16, 1952 (Rec. 38). Time for filing a motion to set aside the order of dismissal would have expired February 15, 1952 (Ch. 77, Sec's. 82, 83, Ill. Rev. Stat.). On February 1, 1952, petitioners filed two motions to vacate the order of dismissal (Rec. 39). On March 11, 1952, their motions were denied (Rec. 83). Time for filing a petition for writ of certiorari in this Court would normally have expired June 9, 1952. On June 6, 1952, the time was extended to and including June 23, 1952, by order of Mr. Justice Minton (Rec. 312). On June 19, 1952, the time was further extended to and including July 16, 1952, by order of Mr. Justice Douglas. On July 16, 1952, the petition was filed. After answer and reply it was denied on October 13, 1952. Time for filing this petition for rehearing will expire October 28, 1952. No adequate non-federal ground could have been the basis of decision of the Supreme Court of Illinois in dismissing the writ of error and in refusing to vacate the order of dismissal (Petition pp. 8-10). There is no jurisdictional impediment to this Court reviewing the case on writ of certiorari.

ADDITIONAL QUESTION PRESENTED

Whether the State of Illinois after granting a charter of incorporation to a private corporation expressly providing that it "shall be forever capable in law to sue and be sued in all and singular matters or demands whatsoever" (Rec. 49) (Rec. ..) may by judicial action exempt it from liability to judgment in tort on a verdict otherwise ripe for judgment without impairing the obligation of the charter-contract that it be subject to unlimited amenability to suit and thus depriving the person otherwise entitled to judgment of his personal security and property without due process of law and denying to him the equal protection of its laws in violation of his federal rights under Section 1 of the 14th Amendment.

Or, separating the precise federal question presented from the general question: Is the protection afforded by Article I Section 10 of the Constitution of the United States against a State impairing the obligations of a contract by legislative action afforded by the 14th Amendment Section 1 when a State impairs the obligations of the contract by judicial decision?

ADDITIONAL SPECIFICATION OF ERROR

That the State of Illinois after granting a charter to the Grand Lodge providing that it "shall be forever capable in law to sue and be sued in all and singular matters or demands whatsoever" (Rec. 49) (Rec. ..) could not by judicial action exempt it from liability to judgment in tort on a verdict otherwise ripe for judgment without impairing the obligation of the charter-contract that it be subject to unlimited amenability to suit and thus has deprived petitioners of their personal security and property without due process of law and denied to them the equal protec-

tion of its laws in violation of their federal rights under the 14th Amendment. (Assignment of Error before Supreme Court of Illinois, No. 16E, Rec. 206; Paragraph 12E Motion to Vacate Order Dismissing Writ of Error, Rec. 43; Suggestions In Support Of Motion IA2, Rec. 48-50).

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

A.

The State Courts in Illinois have decided a federal question of substance not heretofore determined by this Court and in a way probably not in accord with applicable decisions of this and other Federal Courts.

There are special and important reasons why review on writ of certiorari should be granted by this Court. The most important reason is that the State Courts in Illinois, by implication necessarily arising from the judgments of those courts, have decided a federal question of substance not heretofore determined by this Court in a way probably not in accord with applicable decisions of this Court. This is one of the reasons which this Court will consider in granting review on writ of certiorari (Rule 5a). Rulings made by implication necessarily arising from a judgment will be noticed by this Court. *Houston and Texas Central Rd. Co.* v. *Texas*, 177 U.S. 66, 77, 100.

The important Federal question inherent in the Additional Question Presented is this:

> "Is the protection afforded by Article I Section 10 of the Constitution of the United States against a State impairing the obligations of a contract by legislative action afforded by the 14th Amendment Section 1 when a State impairs the obligations of a contract by judicial decision?"

The question arises as follows:

Petitioners, of course, have contended from the beginning of this litigation that respondent is liable to judgment in tort. Respondent, of course, has maintained that it is not. Petitioners contend that the State of Illinois has required and the Grand Lodge has agreed that in consideration of its being granted a corporate charter with power to sue and recover a judgment that it may be sued and a judgment recovered against it in like manner and to the same extent, and that they as members of the public having a special interest in enforcement of that contract are entitled to insist that it be enforced as written when the State of Illinois by judicial decision has attempted to clothe respondent with immunity, however limited, in an action in tort to their injury in violation of the charter-contract.

The charter which the State of Illinois granted to the Grand Lodge of the State of Illinois of the Independent Order of Odd Fellows is a contract between the State of Illinois and that corporation, *University* v. *People,* 99 U.S. 309, 321-322; *Trustees of Dartmouth College* v. *Woodward,* 17 U.S. 518. It cannot be impaired by state legislation. Article 1 Section 10 Constitution of the United States; *University* v. *People,* 99 U.S. 309, 321-322; *Trustees of Dartmouth College* v. *Woodward,* 17 U.S. 518. And the construction placed on the contract is not binding on this Court which will determine for itself the meaning of the contract. *University* v. *People,* 99 U.S. 309, 323. And in making that construction this Court will apply the principles of general contract law. *Priebe & Sons* v. *United States,* 332 U.S. 407, 411; *United States* v. *Standard Rice Co., Inc.,* 323 U.S. 106, 111, and cases there cited.

The charter was introduced in evidence (Rec. 22) and was considered by the Appellate Court in rendering its opinion sustaining immunity (Rec. 7-10) completely ignoring the second section of the charter providing "that the

said corporation and their successors by the name, style and title aforesaid, shall be forever thereafter capable in law *to sue and be sued,* plead and be impleaded, answer and be answered, defend and be defended in all and any courts of justice, and before all and any judge, officers, or persons whatsoever, *in all and singular matters or demands whatsoever.*" (Italics ours). (Rec. 49) (Rec. ..). "By implication necessarily arising from the judgment" the provision quoted was construed not to render respondent liable to judgment in tort. In suing out the writ of error in the Supreme Court of Illinois petitioners assigned as error failure to hold that any immunity to judgment in tort violated the provision of the charter-contract above quoted (Assignment of Error 16E, Rec. 206), and relied on it in their motion to set aside the order of that Court dismissing the writ of error (Paragraph 12E, Rec. 43) and in their suggestions in support of that motion (IA2, Rec. 48-50). Petitioners contended that failure to enforce the charter-contract deprived them of their personal security and property without due process of law and denied them the equal protection of the law in violation of their federal rights under the 14th Amendment. "By implication necessarily arising from the judgment" the Supreme Court of Illinois held that it did not. It follows that if petitioners are right in the construction to be placed on the charter-contract provision relied upon to establish liability the Supreme Court of Illinois has held impairment of the charter-contract by judicial decision does not violate the 14th Amendment.

That Section 2 of the charter makes the respondent liable in tort is established by the decision of this Court in *Keifer & Keifer* v. *R. F. C.,* 306 U.S. 381, 392-397 in which this Court construed a provision similar to that provision. In that case this Court held when Congress launched a governmental agency into the world with authority to "sue

and be sued" that agency is not less amenable to judicial process and judgment in garnishment/because the words "sue and be sued" normally embrace all civil process incident to the commencement or continuance of legal proceedings. This Court said:

> "Reconstruction is the parent of Regional. When creating it, Congress gave Reconstruction various general powers including authority 'to sue and be sued, to complain and to defend, in any court of competent jurisdiction, State or Federal' * * * * The legal position of Regional is * * * * the same as though Congress had expressly empowered it 'to sue and be sued' * * * * Regional claims immunity * * * * because Congress has not subjected it to suit 'in tort.' It is assumed that the present action is not one upon a contract express or implied, and, therefore, outside the purview of 'sue and be sued.' The premise is not valid, nor does the conclusion follow * * * * when it chose to do so, Congress knew well enough how to restrict its consent to suits sounding in contract. * * * * In the light of these statutes it ought not to be assumed that when Congress consented 'to suit' without qualification, the effect is the same as though it had written 'in suits on contract express or implied, in cases not sounding in tort.' * * * * There is * * * * no warrant for imparting such a distinction here."

This decision was relied on by this Court in *R. F. C.* v. *Manihan Corp.*, 312 U.S. 81, 85, in which the defendant was held liable for costs. It will be noted that the charter granted respondent is far stronger than the charter Congress granted to the R. F. C.

In *Alexander Canal Co.* v. *Swann*, 5 How. 83, this Court held that the power of a corporation to sue and be sued includes the power to take any step that an individual might take to reach a final judgment. It follows that the power to sue includes the power to reduce to judgment and that the power to be sued includes the power of another to reduce to judgment against it.

In *Hopkins* v. *Clemson Agricultural College*, 221 U.S. 636, a tort action, this Court held that the College had no immunity to suit because the statute under which it was incorporated "created an entity, a corporation, a juristic person, whose right to hold or use property was coupled with the provision that it might sue or be sued, plead and be impleaded, in its corporate name."

The Supreme Court of Kansas has apparently held that a charitable corporation created with power to "sue and be sued" was liable to judgment in a tort action by reason of that provision although it would otherwise be entitled to immunity. *McMillen* v. *Summunduwot Lodge*, 143 Kans. 502.

It is submitted that if the legislature of the State of Illinois had intended to exempt the respondent from one entire field of legal responsibility, i.e. tort liability, it would ~~not~~ have limited the power to be sued in some manner as by "except in tort" or "only in contract" rather than using the words "in all and singular matters or demands whatsoever." Can a reasonable man come to any other conclusion?

The charter provision is clearly intended to create a right in individual members of the community to sue the Grand Lodge as the need arises to enforce individual rights against the corporation. Under such circumstances they are entitled to the protection afforded by the contract as third party beneficiaries. *Filardo* v. *Foley Bros.*, 297 N.Y. 217, 225. See *Robins Dry Dock and Repair Co.* v. *Flint*, 275 U.S. 303, 307-308; *German Alliance Ins. Co.* v. *Home Water Co.*, 226 U.S. 220, 230.

The Supreme Court of Illinois has therefore held in effect that impairment of the charter-contract provision relied on by petitioners to establish liability by judicial decision does

not violate petitioners constitutional rights under the 14th Amendment. That this conclusion is not in accord with the decisions of this and other federal courts is shown by the following cases.

Township of Pine Grove v. *Talcott*, 86 U.S. 666, 678, held that a contract obligation could not be impaired by judicial decision. You said: *"That end cannot be accomplished unwarrantably no more by judicial decisions than by legislation."* (Italics ours.) And trial courts have held *"A state judicial decision can no more impair the contract in question than can a legislative act."* (Italics ours.) *Brown-Crumner Inv. Co.* v. *Town of North Miami*, 11 F. Supp. 73, 76; *U. S. ex rel. Vermont Inv. Co* v. *City of Cocoa*, 17 F. Supp. 59. It follows that impairment of a contract obligation by a state judicial decision deprives a litigant entitled to enforce the contract of his property (and where as here of judgment in tort, his right to security of person) and denies him the equal protection of the law in violation of the 14th Amendment.

A writ of certiorari should issue in this case.

B.

The chief non-federal question presented, i.e., immunity of non-governmental charity from liability for damages in tort, is one of national importance and a decision by this Court upholding petitioners' position would by charter-contract construction reduce the immunity doctrine in American Jurisprudence to one of possible exemption of trust assets from execution without interfering with the right of any State to determine its own common law policy.

Counsel feel that the non-federal question involved is of tremendous national importance and that while of course

not a basis in the absence of a federal question for allowing certiorari that importance may be properly considered by this Court as a reason for reviewing the case when as here a federal question is presented for decision. Here the non-federal question of course is the question of immunity of non-governmental charity from liability for damages in tort under circumstances where other persons would be liable to judgment.

That the question is of great national importance is shown by the cases printed at pages 1 to 28 of 25 ALR 2d, just off the press, in which immunity was denied, and the annotation at pages 29-200 covering the subject. It is particularly noted that only a few of the reported cases deal with the effect of constitutional or statutory provisions in determining tort liability of charities and that such provisions "do not afford a substantial basis for deciding either in favor or against immunity" (pp. 54-55). Apparently abandonment of the rule granting charities immunity, wholly or in part, is recommended (p. 45).

This Court has a rare opportunity to exercise a decisive influence in the right direction by solving the problem at least as far as immunity from judgment is concerned by granting certiorari, adopting petitioners' construction of the charter-contract, and upholding their contention that impairment of the charter-contract by the State of Illinois, by judicial decision, has violated the 14th Amendment of the Constitution of the United States. The decision would be decisive since almost all corporate charters contain the magic words "sue and be sued" etc. or their equivalent and the states would be compelled to follow the construction placed upon such language by this Court. It would remove the entire question of liability of charitable corporations to judgment from American jurisprudence and leave only the question of exemption of whether assets held in trust

may be taken to satisfy a judgment sounding in tort when rendered against a charity) to be determined.

The phrase "sue and be sued" is the lock and this Court is the key by which the common law of the various states may be unburdened from the lumbering baggage-wagons of old precedents granting full or limited immunity to charitable corporations (to which they feel bound by *stare-decisis*) without interfering in the slightest with the right of any state to develop its own common law policy.

The opportunity should not be missed.

C.

It is a matter of common belief among lawyers and the public that this Court in matters not involving Civil Rights has through the simple device of denying certiorari abandoned the Citizens of the United States to the whim and caprice of the State Courts in the development of the common law policy of the various States no matter how unreasonable that common law policy may be. Granting certiorari in this case would tend to destroy what counsel hope is an unwarranted belief and would act as a warning to State Courts against adopting an unreasonable common law policy.

For the reason stated in the heading certiorari should be granted in this case and review to include the questions set forth in the Petition for Writ of Certiorari as well as the Additional Question submitted in this Petition.

CONCLUSION

For the foregoing reasons this petition for rehearing should be allowed and for the reasons stated in the petition for writ of certiorari the Court should order a writ of certiorari to issue in this case.

Respectfully submitted,

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DAVID F. MATCHETT, JR.,
WALTER F. DODD,
HUBERT L. WILL,

By .....
Walter F. Dodd,
Counsel for Petitioners.

Dated: Chicago, Ill. October 27th, 1952.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1952.

No. 201

FRED SLENKER and ELIZABETH SLENKER,
Petitioners,

VS.

GRAND LODGE OF THE STATE OF ILLINOIS OF THE INDEPENDENT ORDER OF ODD FELLOWS,
Respondent.

Response to Petition for Rehearing.

To The Honorable Chief Justices And Associate Justices Of The Supreme Court Of The United States:

JURISDICTIONAL DEFECTS.

For reasons stated in respondent's answer to the petition for writ of certiorari, on jurisdictional aspects, it is contended that the order of October 13, 1952, denying petition for writ, is amply sustained for the reason that the

court was without jurisdiction to grant the writ under 28 U.S.C.A. 1257 (3) invoked by petitioners.

Respondent contends that the unsupported claim of petitioners that there is no jurisdictional impediment to the granting of the writ is not supported by the record and that there is nothing in their "additional question presented" which supplies the jurisdictional deficiencies pointed out in respondent's answer.

RESPONSE TO PETITIONERS' ALLEGED "ADDITIONAL QUESTION".

A. The Point urged is not available to Petitioners.

The contention that the effect of the state court decisions granting immunity to respondent nullifies certain parts of the state statute under which respondent was organized and that by reason of such holding petitioners' constitutional rights have been violated was not raised or passed upon by the trial court or the appellate court and was not in the record when the state Supreme Court denied the petition for leave to appeal from the judgment of the appellate court or when the court dismissed the petition for review by writ of error. Petitioners filed a motion in the Supreme Court of Illinois to vacate its order of January 16, 1952 dismissing the petition for writ of error and in suggestions in support of their motion, it was contended that in the light of the statutory provision, respondent should not be held immune from liability but no claim was made that the construction adopted would violate petitioners' constitutional guaranty against impairment of contract.

We do not concede that the judgments of the state courts had the effect of nullifying statutory direction but even so, the point now raised as an available additional question not previously presented has not been passed upon by the State Courts. It is not such an "additional question" as is permitted in a petition for rehearing by Rule 332.

B. Effect of State Court decisions holding respondent immune from liability.

Petitioners contend that the state court decisions grant respondent absolute immunity from liability in tort actions of every kind and that by such holding the statute which vests respondent with the power to sue and imposes the burden of being sued is nullified. The opinions assailed are not subject to such interpretation for the opinion of the appellate court limits its holding to the protection of respondent's trust funds and not to absolute immunity from all tort actions. Respondent's answer filed in the trial court set forth that it was a charitable organization and that all its services were of a charitable character. An issue was formed on such allegations and the evidence introduced by respondent showed that its funds were devoted exclusively to public charities and all its services were to further the purposes of such charities. No claim was made by petitioners in the trial that respondent had insured its trust funds so that if a judgment was obtained such funds would be protected against process issued on the judgment or that respondent had funds not devoted to the charitable trust which could be used to satisfy any judgment that might be entered. Accordingly, the only judgment that could be entered was that respondent's right to immunity had been established.

The opinion of the Appellate follows closely the opinion of the Supreme Court in *Moore* v. *Moyle,* 405 Ill. 555 and makes the distinction between an absolute immunity from being sued in any tort action and immunity which protects its trust funds from being lost by judgments entered in tort actions.

In *Moore* v. *Moyle,* 405 Ill. 555, the charitable institution had procured insurance to protect it against liability arising out of the wrongful acts of its agents and servants. In noting the distinction between an absolute immunity of a charitable institution in all tort actions brought to recover damages for the wrongful acts of its agents and servants and immunity which protected its trust funds the court said, "We are of the opinion that the exemption or immunity which has been afforded a charitable institution should go no further than to protect its trust funds from being taken to satisfy its liability for the tortious acts of its agents or servants. • • • Beyond that the rule of *respondeat superior* is in effect".

The rule announced in *Moore* v. *Moyle* and followed by the appellate court in this case, 344 Ill. App. 1, cannot be interpreted as holding that the statutory directive that it could sue and be sued has been nullified or modified by such decision.

C. Constitutional prohibitions against impairment of contract not involved.

Respondent does not concede that the decisions of the state court in this case are counter to statutory provisions, but even so, such conflict would not be a transgression of

petitioners' constitutional guarantees prohibiting impairment of contracts. They were not parties to the charter contract and had no interest in the contract which the constitutional provision protected.

For the reasons stated in the answer to the petition for writ of certiorari and in this response, the petition for rehearing should be denied.

Respectfully submitted,

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IN THE

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FRED SLENKER and ELIZABETH SLENKER,
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vs.

GRAND LODGE OF THE STATE OF ILLINOIS OF THE INDEPENDENT ORDER OF ODD FELLOWS,
Respondent.

REPLY TO RESPONSE TO PETITION FOR REHEARING

To The Honorable Chief Justice and Associate Justices of The Supreme Court of the United States:

Your petitioners, Fred Slenker and Elizabeth Slenker, reply to respondent's Response to Petition for Rehearing as follows:

Reply to Claim of Jurisdictional Defects

At page 2 line 3 of the Response petitioners' statement that there is no jurisdictional impediment to the granting of the writ is characterized as an "unsupported claim." Respondent's characterization is belied by the Petition for Writ of Certiorari at pages 8 to 10, inclusive.

Reply to Respondent's Point "A"

The charter-contract was impaired by the decision of the Illinois Appellate Court: that impairment became final and irrevocable when the State of Illinois acting through its judicial department denied further review by appeal giving rise to the constitutional questions specified in the Assignment of Errors urged in support of the writ of error in the Supreme Court of Illinois. (Rec. 206.) The Assignment of Error here relied on appears as Assignment of Error No. 16E, Record 212.

In response to respondent's contention that "no claim was made that the construction adopted would violate petitioners' constitutional guaranty against impairment of contract" (Response, p. 2), respondent reads Subparagraph E out of context. Assignment of Error No. 16E is an integral part of Assignment of Error No. 16 and when read in context it is quite clear that petitioners there contended as they do here that their federal rights under the 14th Amendment had been violated by impairment of the charter-contract. Petitioners' motion in the Supreme Court of Illinois to vacate its order of January 16, 1952, restates Assignment of Error No. 16 as Paragraph 12 of that motion. (Rec. 42-45.)

Suggestion IA2 and III in support of that motion taken together spell out the constitutional question precisely (Rec. 46, 48-50, 71-80.) The attention of the Court is directed to the following statement:

> "The State of Illinois has required and the Grand Lodge of the State of Illinois of the Independent Order of Odd Fellows has agreed that in consideration of its being granted a corporate charter with power to sue and recover a judgment that it may be sued and a judgment recovered against it in the same manner and to the same extent. The plaintiffs, as members of the

> public, are third party beneficiaries of the contract. It should be enforced for their benefit." (Rec. 50.)

and the following language under Section III: "By Reason of Each of the Errors Committed by the Trial Court and Appellate Court Coupled with the Extinction of Any Possibility of Correcting Them by Appeal * * * the State of Illinois acting through Its Judicial Department Has Deprived Plaintiffs of Their Constitutional Rights" (Rec. 71-72) *i.e.*, their rights under the 14th Amendment. (Rec. 72-80.)

Reply to Respondent's Point "B"

At page 3 of the Response respondent states: "Petitioners contend that the state court decisions grant respondent absolute immunity from liability in tort actions of every kind. * * *" They make no such contention. That was respondent's contention in the trial court. The Illinois law is clearly stated at page 15 of the Petition for Writ of Certiorari.

Under *Moore* v. *Moyle*, 405 Ill. 555, petitioners are entitled to judgment but not to execution against trust funds. But petitioners have been denied their judgment in spite of *Moore* v. *Moyle* and in clear violation of the terms of the charter-contract that it "shall be forever capable in law to sue and be sued in all and singular matters or demands whatsoever." (Rec. 49.) On what grounds can the phrase quoted be qualified by implication by the words "except in tort unless covered by liability insurance or presently possessed of non-trust funds"? Obviously, petitioners have been denied due process and equal protection of the laws. The fact that immunity to judgment is limited is of no moment whatsoever. Immunity, limited or unlimited, impairs the obligations of the charter-contract and is a clear violation of the 14th Amendment. From a moral viewpoint

it is just as bad to steal a penny as it is to steal a dime, and just as bad to steal a dollar as a hundred dollar bill.

It is a particularly vicious aspect of the case that the respondent is no more a corporation organized for charitable purposes and not for profit than the New York Central Railroad or the Standard Oil Company or the Greyhound Bus Lines. They are subject to liability because they may sue and be sued by virtue of their corporate charters. How could Illinois grant such corporations immunity to judgment without violating a plaintiff's rights under the 14th Amendment? How can it do so here?

Reply to Respondent's Point "C"

The third party feature of the argument itself is worthy of consideration and determination by this Court.

Respondent begs the question. For whose benefit then was the provision that respondent "shall be forever capable in law to sue and be sued in all and singular matters or demands whatsoever" incorporated in the charter-contract? And how could an action be maintained by anyone against the corporation in the absence of such a provision either express or implied?

CONCLUSION

It is submitted that a Writ of Certiorari should issue in this case.

Respectfully submitted,

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DAVID F. MATCHETT, JR.,
WALTER F. DODD,
HUBERT L. WILL,

By .....
Walter F. Dodd,
Counsel for Petitioners.

Dated: Chicago, Ill., Nov. 7, 1952.